

2005

Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks

Eisuke Suzuki
Asian Development Bank

Suresh Nanwani
Asian Development Bank

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Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005).
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RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: THE ACCOUNTABILITY MECHANISMS OF MULTILATERAL DEVELOPMENT BANKS

*Eisuke Suzuki**
*Suresh Nanwani***

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* Former Director General, Operations Evaluation Department, and former Deputy General Counsel, Asian Development Bank (ADB). J.S.D. 1974, Yale Law School. E-mail: acesuzuki@gmail.com.

** Associate Secretary, Compliance Review Panel, and Former Senior Counsel, ADB. LL.M. 1982, University of London. E-mail: snanwani@adb.org.

The views expressed herein are our personal views and do not necessarily reflect those of the ADB. We are the authors of ADB, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism*, ADB Doc. R-79-03 (2003), available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/ADB_accountability_mechanism.pdf (last visited Aug. 5, 2005).

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*Throughout its history, the development of international law has been influenced by the requirements of international life*¹

I. INTRODUCTION

While the United Nations General Assembly adopted the Articles on Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission (ILC) in December 2001,² only recently did the ILC decide to include the topic of "Responsibility of international organizations" in its long-term work program.³ Although the International Law Association (ILA) has been considering the accountability of international organizations through its Committee on the Accountability of International Organizations, established in May 1996,⁴

1. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

2. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/Res/56/83 (Jan. 28, 2002). See generally THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (James Crawford ed., 2002) [hereinafter THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY].

3. U.N. Int'l L. Comm'n, *Report of the International Law, Fifty-Second Session*, U.N. GAOR, 55th Sess., Supp. No. 10, at 292, U.N. Doc. A/55/10 (2000).

4. In this Article, by "international organization" we refer to an intergovernmental organization as defined in article 2(1)(i) of the Vienna Convention on the Law of Treaties and article 2 (1)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(i), 1155 U.N.T.S. 331, 8 I.L.M. 679; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, March 21, 1986, art. 2(1)(i), 25 I.L.M. 543. In May 1996, the International Law Association's Executive Council decided to establish a Committee on Accountability of International Organizations [hereinafter ILA Committee]. The first report of the Committee was presented to the 68th Conference of the ILA in Taipei in 1998 and laid

the timing of the ILC's decision to include the topic was related to the completion of its state responsibility project in 2001.⁵ Article 57 of the Articles on Responsibility of States for Internationally Wrongful Acts provides: "These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any state for the conduct of an international organization."⁶ The key element in the conception of state responsibility developed under the ILC's project was, in the words of James Crawford, "the abandonment of an exclusively synallagmatic conception of responsibility," i.e., the responsibility of one state to another state.

The legal personality of international organizations could no longer be seen as a *démarche* for member states to avoid joint and several responsibility for their conduct.⁸ It would be "fantastic" to assume that international organizations "are authorized to violate the principles they were established to serve" and it would "be perverse, even destructive, to postulate a community expectation that IOs [international organizations] need not conform to the principles of public order."⁹ It is now clear that the legal personality of international organizations entails a responsibility for their conduct. These developments have sharpened focus on the relationships of an international organization with its member states,

out the general themes that were appropriate for study and consideration. See ILA Report of the Sixty-Eighth Conference, Taipei, May 24–30, 1998, *Report of the International Law Association Committee on Accountability of International Organizations*, 584 [hereinafter *First Report*]. The second report presented to ILA's 69th Conference in London in 2000 discussed relevant general principles. ILA Report of the Sixty-Ninth Conference, London, July 25–29, 2000, *Report of the International Law Association Committee on Accountability of International Organizations*, 878 [hereinafter *Second Report*]. The third report consolidated, revised, developed, and expanded the second report's "recommended rules and practices." ILA Report of the Seventieth Conference, New Delhi, Apr. 2–6, 2002 *Report of the International Law Association Committee on Accountability of International Organization*, 772 [hereinafter *Third Report*]. The ILA's 71st Conference in Berlin in August 2004 adopted the Final Report of the Committee on the Accountability of International Organizations. ILA Report of the Seventy-First Conference, Berlin, Aug. 16–21, 2004 *Report of the International Law Association Committee on Accountability of International Organizations*, available at <http://www.ila-hq.org/pdf/Accountability/Final%20Report%202004.pdf> (last visited Aug. 5 2005) [hereinafter *Final Report*].

5. Responsibility of States for Internationally Wrongful Acts, *supra* note 2; THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, *supra* note 2.

6. THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, *supra* note 2, at 311, ¶¶ 4–5 (providing commentary to article 57).

7. JAMES CRAWFORD, *INTERNATIONAL LAW AS AN OPEN SYSTEM* 29 (2002).

8. *Id.* at 20, 30: ("[O]ne might say that public international organizations were entities created by states with a view to avoiding joint and several liability."). But see International Tin Council Appeals, 3 ALL E.R. 257, 307 (1988). For analysis, see C.F. Amerasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, 85 AM. J. INT'L L. 259 (1991).

9. Mahnouch H. Arsanjani, *Claims Against International Organizations: Quis Custodiet Ipsos Custodies*, 7 YALE J. WORLD PUB. ORD. 131, 133–34 (1981).

other international organizations, and third parties, and have clarified different forms and ranges of accountability of international organizations.¹⁰

Given the reality of international life in which international organizations participate, there are inevitably many facets to their accountability. As the First Report of the ILA's Committee of Accountability of International Organizations stated, "Accountability is not a notion which, for the sake of its operability, is or has to be viewed as monolithic, calling for uniform and indiscriminate application. Such rigidity would not survive the complexities of international reality."¹¹ Instead, accountability is multifaceted, with various degrees of consequences ranging from oversight, monitoring, and evaluation processes to censorship or other forms of sanctions to the attribution of legal liability for injuries, resulting in binding remedial action.¹²

As international organizations expand their roles and activities in an ever-increasing number of areas of international life, there is a corresponding expansion of responsibility for their interactions with an equally increasing number of other nonstate entities like individuals, groups of individuals, transnational corporations, nongovernmental organizations, minorities, and indigenous peoples. These nonstate entities are also claiming "their particular legal position[s] within the ambit of international law."¹³ International organizations "must, therefore, also be deemed subject to a commensurately expanded reach of general or customary international law,"¹⁴ and the rights and duties of any of these organizations "must depend upon its purposes and functions as specified or implied in its constituent documents and *developed in practice*."¹⁵

One of the most tangible results of these developments is the establishment of inspection functions or accountability mechanisms for

10. See, e.g., the *First Report*, *Second Report*, *Third Report*, and *Final Report*, *supra* note 4; U.N. Int'l L. Comm'n, *First Report on Responsibility of International Organizations: Report of the Special Rapporteur*, U.N. Doc. A/CN.4/532 (2003); U.N. Int'l L. Comm'n, *Second Report on Responsibility of International Organizations: Report of the Special Rapporteur*, U.N. Doc. A/CN.4/541 (2004); U.N. Int'l L. Comm'n, *Report of the International Law Commission*, U.N. GAOR, 58th Sess., Supp. No. 10, at ¶¶ 53–54, U.N. Doc. A/58/10 (2003); and U.N. Int'l L. Comm'n, *Report of the International Law Commission*, U.N. GAOR, 59th Sess., Supp. No. 10, ¶¶ 71–72, U.N. Doc. A/59/10, (2004).

11. *First Report*, *supra* note 4, at 598.

12. *Id.* at 5.

13. *Id.* at 596.

14. Günther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development*, 92 AM. J. INT'L L. 642 (1998), reprinted in GÜNTHER HANDL, *MULTILATERAL DEVELOPMENT BANKING: ENVIRONMENTAL PRINCIPLES AND CONCEPTS REFLECTING GENERAL INTERNATIONAL LAW AND PUBLIC POLICY* 26 (2001).

15. Reparation for Injuries Suffered in the Service of the United Nations, *supra* note 1, at 180 (emphasis added).

multilateral development banks (MDBs), allowing third parties to file complaints regarding violations of a bank's internal policies and procedural requirements in designing, processing, or implementing MDB-assisted projects.¹⁶ However remarkable this development in demanding accountability of MDBs may be, banks still consider accountability mechanisms as internal governance tools for enhancing the operational effectiveness and discipline of the organization. As such, the question of accountability remains, strictly speaking, within the purview of the organization's internal law. Even so, it has become part of broader questions of international organizations' responsibility under international law. As Günther Handl remarked:

While each MDB's inspection procedure will *ostensibly focus on* whether the existing operational policies and procedures have been followed with regard to bank-financed projects, at the end of the day, it will call attention also to *the very existence of international obligations incumbent upon the MDB concerned* and to the degree to which these obligations are reflected in the institution's by-laws and policies in the first place.¹⁷

This Article will focus on the development of access for third parties, particularly private individuals, to lodge claims against MDBs for noncompliance with their policies and procedures. Part II briefly reviews the overall context of the establishment of accountability of MDBs in the global decision process. Part III analyzes the adequacy of the current legal regime for the determination of responsibility of international organizations. Part IV postulates the substantive and procedural principles for setting up an MDB accountability mechanism, examines how private individuals and groups can lodge complaints against MDBs, and analyzes the limitations on such access. Part V examines the emerging treatment of private individual access to MDBs' operational activities by analyzing new developments in the structure of an accountability mechanism. Finally, the Article recommends an institutional innovation to allow each MDB's administrative tribunal to function as a special tribunal.

16. For the most comprehensive accountability mechanism of MDBs, see ADB, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism*, ADB Doc. R79-03 (May 8, 2003) [hereinafter *New ADB Accountability Mechanism*], available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/ADB_accountability_mechanism.pdf (last visited Aug. 5, 2005). See also IBRAHIM F. I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* (2nd ed. 2000); DANIEL D. BRADLOW, *STUDY ON AN INSPECTION FUNCTION FOR THE AFRICAN DEVELOPMENT BANK GROUP* (2003).

17. HANDL, *supra* note 14, at 4 (emphasis added).

II. THE CONTEXT OF THE ESTABLISHMENT OF ACCOUNTABILITY OF MDBS IN THE GLOBAL DECISION PROCESS

International organizations are just one of many nonstate groupings and associations created by individuals, including political parties, non-governmental organizations (NGOs), pressure groups, and private associations, that compose a larger global community. All of these entities engage in activities transcending territorial boundaries. These interdependent activities within and across global social processes stimulate, affect, and are affected by decision processes.¹⁸ However interdependent and interdeterminant this global community process may be in its decision structures and procedures, it still exhibits mutual tolerance and reciprocity among states and other relevant actors, who may, by a *dédoulement fonctionnel*, be claimants in one case and sit as decisionmakers in the next comparable case.¹⁹ In areas where legal norms and principles are incipient, the conduct of states and other relevant non-state actors on the international plane shapes the contours of a general practice to be accepted as law.²⁰ MDBs are decisionmakers in this global process, and choices relating to the accountability of MDBs perforce reflect the basic decision structures and procedures of international law.²¹

A. Immunities of International Organizations and Accountability

International organizations enjoy certain immunities and privileges in the conduct of their operations. A member state's jurisdiction and, in particular, the host state's jurisdiction do not extend to them. As a result, international civil servants working within these international organizations have no recourse to third party dispute settlement mechanisms outside their organizations.²² Externally, third parties—individuals and other relevant entities, including groups and NGOs—who are affected by international organizations' operations have no effective access to offi-

18. For detailed description, see Myres S. McDougal, Michael Reisman, & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988). These interdependencies are minutely described in MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 3-93 (1980).

19. See W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARD 171-220, 221-264, 637-673 (1971).

20. MYRES S. MCDUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 48 n.125 (1962).

21. See Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, in INTERNATIONAL ESSAYS 191 (Myres S. McDougal & W. Michael Reisman eds., 1981); MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY (1981).

22. See generally, MICHAEL B. AKEHURST, THE LAW GOVERNING EMPLOYMENT RELATIONS IN INTERNATIONAL ORGANIZATIONS (1967).

cial fora in which to file complaints and seek appropriate remedies. Consequently, even though accountability of international organizations is “a legitimate concern for the variety of actors on the international scene,”²³ it has remained “a goal which may require a rather substantial degree of progressive development.”²⁴

To overcome the immunities of international organizations from local jurisdiction, the United Nations and its related specialized agencies (hereinafter collectively referred to as the UN system organizations) established their respective international administrative tribunals to address employment-related disputes between staff and employers.²⁵ In contrast, the Bretton Woods organizations, in which the member states’ shareholding (as determined by their amount of capital subscription) influences decisionmaking, have taken a different path in terms of transparency and accountability. Their special character sets them apart from the rest of the UN system organizations. For example, the World Bank and the IMF justified their lack of information disclosure on the basis of the nature of their work with sensitive macroeconomic and financial policy questions of member states.²⁶ Their status as specialized agencies under Article 57

23. *First Report*, *supra* note 4, at 587.

24. *Id.*; Konrad Ginther, *International Organizations, Responsibility*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1336, 1339 (1988) (“The current legal situation reveals that efforts at endowing international organizations with the status of international legal subjects which have a responsibility of their own provide for a generally acceptable balance of risk, but these efforts have only partially successful. The law on the responsibility of international organizations is still in a state of flux.”).

25. In its Advisory Opinion on the Effect of Awards, the ICJ observed:

[I]t would in the opinion of the Court hardly be consistent with the express aim of the Charter to promote freedom and justice for individuals and the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any dispute which may arise between it and them.

Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 57 (July 13). See C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 329–32 (1996). See also C.F. AMERASINGHE, 1 & 2 *THE LAW OF THE INTERNATIONAL CIVIL SERVICE: AS APPLIED BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS* (1988).

26. The IMF’s archives policy was modified in 1999, and the access that had been denied was allowed for executive board documents that are five years old and other documents that are 20 years old (except for strictly confidential and secret material); see IMF Decision No. 11915 (99/23) (Mar. 8, 1999). See also *Publication Policies of the Fund*, Decision No. 12405 (01/02) (Jan. 4, 2001). The IMF reviewed its transparency policy in 2002 and 2003. See *The Fund’s Transparency Policy, Issues and Next Steps* (Sept. 12, 2003); *The Fund’s Transparency Policy, Issues and Next Steps* (Feb. 12, 2004) (Amendments to the Transparency Policy Decision), available at <http://www.imf.org/external/np/pdr/trans/2004/021204.htm> (last visited Aug. 5, 2005). The World Bank adopted its policy on disclosure of information in March 1994, which was revised extensively in August 2001. See *The World Bank Policy on Disclosure of Information* (June 2002), available at <http://www.worldbank.org/operations/disclosure/documents/disclosurepolicy.pdf> (last visited Aug. 5, 2005).

of the UN Charter notwithstanding, neither the World Bank nor the IMF made use of the United Nations Administrative Tribunal or the ILO Administrative Tribunal.²⁷ Only in 1979, after the enormous expansion of its operations and the deterioration of staff morale, did the World Bank establish an administrative tribunal to satisfy the basic international human right of due process.²⁸

In response to the need to serve the interests of both staff and the administration of the organization, many other MDBs followed suit in setting up independent judicial bodies during the 1980s and 1990s to resolve internal disputes.²⁹

B. MDBs and the Global Decision Process

The IMF and the World Bank, established as global financial institutions, are organized on the basis of each member's capital subscription to the financial resources of the organization. The institutions weigh each member's voting power according to the size of its capital subscription, as opposed to the equal one-vote-per-member system of the United Nations.³⁰ The subsequent organization of regional MDBs basically patterned after the World Bank.³¹ The Asian Development Bank (ADB),

27. Andrés Rigo Sureda, *Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank*, in INTERNATIONAL ORGANIZATION AND DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 165, 168–69 (L. de Chazoumes, et al. eds., 2002). See also C.F. Amerasinghe, *The World Bank Administrative Tribunal*, 31 INT'L & COMP. L.Q. 748, 750 (1982).

28. For a discussion of major reasons for the establishment of the World Bank Administrative Tribunal, see Amerasinghe, *supra* note 27, at 748–52.

29. See, e.g., AMERASINGHE, *supra* note 25, at 452–65; HENRY G. SCHERMERS & NILES M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §§ 641–47 (3rd ed. 1995). For a relationship between international organizations and the administrative tribunals they belong to, see Eisuke Suzuki, *The Review and Repudiation of Judgments of International Administrative Tribunals*, 7 ASIAN Y.B. INT'L L. 175, 206 (1997).

30. See generally, EDWARD S. MASON & ROBERT E. ASHER, THE WORLD BANK SINCE BRETTON WOODS (1973); KENNETH W. DAM, THE RULES OF THE GAME: REFORM AND EVOLUTION IN THE INTERNATIONAL MONETARY SYSTEM 71–114 (1982); JOSEPH GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS 292 (1979). See also Dennis Leech & Robert Leech, *Voting Power in the Bretton Woods Institutions* (2005), at <http://www.warwick.ac.uk/~ecrac/LeechPower BWL.pdf> (last visited Aug. 5, 2005) (a paper presented to the Development Studies Association Conference, Glasgow, Sept. 10–12, 2003).

31. The regional MDBs referred to in this Article are the Inter-American Development Bank set up by the Agreement Establishing the Inter-American Development Bank, available at <http://www.idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=555080> (last visited Aug. 5, 2005) [hereinafter IDB Charter]; the Asian Development Bank set up by the Agreement Establishing the Asian Development Bank, available at <http://www.adb.org/Documents/Reports/Charter/charter.pdf> (last visited Aug. 5, 2005) [hereinafter ADB Charter]; the African Development Bank set up by the Agreement Establishing the African Development Bank, available at http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/LEGALINFORMATION/AGREEMENT_ESTABLISHING_ADB_JULY2002_EN.DOC (last

the African Development Bank (AfDB), the European Bank for Reconstruction and Development (EBRD), and the Inter-American Development Bank (IDB), with their operational domains in Asia and the Pacific, Africa, Central and Eastern Europe, and Central and South America, respectively, are conventionally called *regional* development banks, even though each organization's membership extends beyond the geographical scope of its operational domain to North America, Western Europe, Japan, and Australasia. Accordingly, each regional development bank and the World Bank count the same industrialized countries as their members and provide representation for these countries on their respective Boards of Executive Directors. As a result, what is happening in one institution is likely to also take place in another institution because the sources of external demands are basically the same. Because industrialized member states are more influential and larger shareholders of, or contributors to, the financial resources of MDBs, it is unlikely these banks will ignore the decisions of G-7 Finance Ministers.³²

In the global decision process, MDBs are not only decisionmakers in promoting, prescribing, and applying their preferred policies. Because the weighted voting power of MDBs is a fundamental watershed separating them from other international organizations, these banks also provide arenas for decision for their most powerful member states.

The events that led to the creation of the World Bank's Inspection Panel illustrate this global decision process. NGOs played a significant role as decisionmakers in a long history of campaigns against the Bank for increased accountability and information disclosure³³ regarding its

visited Aug. 5, 2005) [hereinafter AfDB Charter]; and the European Bank for Reconstruction and Development set up by the Agreement Establishing the European Bank for Reconstruction and Development, *available at* <http://www.ebrd.com/pubs/insti/basic/basic1.htm> (last visited Aug. 5, 2005) [hereinafter EBRD Charter].

32. See, e.g., Statement of G-7 Finance Ministers, Halifax, Nova Scotia (June 15, 2002), *available at* <http://www.g7.utoronto.ca/finance/fm061502.htm> (last visited Aug. 5, 2005); STRENGTHENING THE INTERNATIONAL FINANCIAL SYSTEM AND THE MULTILATERAL DEVELOPMENT BANKS, REPORT OF G-7 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS (2001), *available at* <http://www.g7.utoronto.ca/finance/fm010707.htm> (last visited Aug. 5, 2005); Statement of G-7 Finance Ministers and Central Bank Governors, Palermo, Italy (Feb. 17, 2001), *at* <http://www.g7.utoronto.ca/finance/fm20010217.htm> (last visited Aug. 5, 2005). See also John Williamson & C. Randall Hening, *Managing the Monetary System, in* MANAGING THE WORLD ECONOMY FIFTY YEARS AFTER BRETTON WOODS 83, 102-06 (Peter B. Kenen ed., 1994). The United States, having 17.46% of the total quota (representing 17.14% of the total voting power in the IMF as of July 11, 2005), has a sole veto power, in that any major decision calls for a majority of at least 85% of the total voting power. GOLD, *supra* note 30, at 317. See also Eisuke Suzuki, *The Fallacy of Globalism and the Protection of National Economies*, 26 YALE J. INT'L L. 319 (2001).

33. See LORI UDALL, THE WORLD BANK INSPECTION PANEL: A THREE YEAR REVIEW, ch. 1 (1997).

ineffective implementation of or non-adherence to its policies.³⁴ This history started with the long grassroots campaign and public debate over the Sardar Sarovar (Narmada) Project in India between 1985 and 1993, which culminated in the creation of an independent commission headed by Bradford Morse, former U.S. Congressman and Director of the United Nations Development Programme, to undertake an independent review.³⁵ Faced with growing criticism of its project management and operations performance, the World Bank established a Portfolio Management Task Force³⁶ that produced the report, "Effective Implementation: Key to Development Impact" (the Wapenhans Report) in 1992. The Wapenhans Report critically evaluated the World Bank's performance by noting that it deemed 37.5 percent of its projects completed in 1991 as failures, up from 15 percent in 1981 and 30.5 percent in 1989.³⁷ Wapenhans summed up his views of the World Bank's performance: "There is a declining trend in project performance . . . and the [World] Bank is contributing to it because of the presence of an *approval culture*."³⁸

In response to the Wapenhans Report's recommendations, the World Bank concluded in its action plan that "the interest of the Bank would be better served by the establishment of an independent Inspection Panel" with a view to augmenting the Bank's existing supervision, audit, and evaluation functions.³⁹

34. These projects included the Polonoreste project in Brazil, the Yacyreta Hydroelectric Project in Argentina and Paraguay, the Kedung Ombo Multipurpose Dam and Irrigation Project in Indonesia, the Narmada River Development (Gujarat) Sardar Sarovar Dam and Power Project in India, and the Narmada River Development (Gujarat) Water Delivery and Drainage Project in India [hereinafter Sardar Sarovar (Narmada) Project]. See UDALL, *supra* note 33, at 5. See also Augustinus Rumansara, *Indonesia: The Struggle of the People of Kedung Ombo*, in *THE STRUGGLE FOR ACCOUNTABILITY—THE WORLD BANK, NGOS AND GRASSROOTS MOVEMENTS* 123–49 (Jonathan A. Fox & L. David Brown eds., 2000).

35. UDALL, *supra* note 33.

36. Report of the World Bank's Portfolio Management Task Force, *Effective Implementation: Key to Development Impact*, R92-125, (Nov. 3, 1992). See also SHIHATA, *supra* note 16, at 2–4.

37. Report of the World Bank's Portfolio Management Task Force, *supra* note 36, at ii. In a candid evaluation of the World Bank's lending procedures, the report said that many problems stemmed from the World Bank's failure to ascertain *actual flow* of benefits or to evaluate the sustainability of projects during their operational phase. *Id.* at iv.

38. World Bank, *Summary of Oral History Transcript*, Willi A. Wapenhans (Aug. 19, 1993) (emphasis added), at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0jpagePK:34991~theSitePK:29506~menuPK:35063~contentMDK:20042044,00.html> (last visited Aug. 5, 2005).

39. World Bank, *Portfolio Management: Next Step, A Program of Actions*, at ¶ 60 (July 22, 1993). See also SHIHATA, *supra* note 16, at 3. As the General Counsel of the World Bank witnessed, "[t]he creation of an operations inspection function in the World Bank came as a response to a new Bank Management's concerns with the efficiency of the Bank's work." *Id.* at 1.

Important occasions for members of significant voting power to exercise their influence include the periodic meetings called to negotiate the replenishment of concessional development funds such as the International Development Association (IDA),⁴⁰ the Asian Development Fund (ADF),⁴¹ and the African Development Fund (AfDF).⁴² As one commentator remarked:

There can be little doubt in the mind of anyone involved in a MDF [Multilateral Development Fund] replenishment negotiation of the powerful role played by the Deputies in decisively influencing the direction and content of MDB operational, financial, and even internal administrative policies. They do so by conditioning their support and the periodic contributions of their governments on being satisfied that their own *donor conditionalities and priorities*—often subtly and sometimes not so subtly expressed during replenishment negotiations—as to what the MDBs (and not just the MDFs) will do, how they will do it and how they are to be run, will be met by MDB managements.⁴³

IDA's 10th replenishment negotiation process in 1992 served as a further vehicle for the promotion of accountability.⁴⁴ The Morse Commission's report, issued in June 1992, and the Wapenhans report, released in November 1992, contributed to this global decision process. Both reports reinforced NGO proposals for an independent mechanism to allow adversely affected people to air their grievances on a World Bank-assisted project.

The establishment of the World Bank's Inspection Panel in late 1993⁴⁵ was an extraordinary development that further underpinned the transparency and accountability of MDBs. Never before had any entity independent of the governing organs of an international organization existed to hear and investigate complaints filed by private individuals

40. PERCY S. MISTY, *MULTILATERAL DEVELOPMENT BANKS: AN ASSESSMENT OF THEIR FINANCIAL STRUCTURE, POLICIES AND PRACTICES* 86–90 (1995).

41. *Id.* at 93–96.

42. *Id.* at 90–93.

43. *Id.* at 118. *See also* IBRAHIM F. I. SHIHATA, *THE WORLD BANK LEGAL PAPERS* 564 (2000).

44. MISTY, *supra* note 40, at 118. *See also* SHIHATA, *supra* note 16, at 4.

45. *See* International Bank of Reconstruction and Development, I.B.R.D. Res. 93-10 (Sept. 22, 1993); International Development Association, IDA Res. 93-6 (Sept. 22, 1993), available at <http://wbln0018.worldbank.org/IPN/ipnweb.nsf/WRelease/A31199D3A1AFBC0E8525690000682B79> (last visited Aug. 5, 2005) [hereinafter World Bank Inspection Panel Resolution]. The two Resolutions are identical and are reprinted in World Bank, *World Bank Operational Manual: Bank Procedures*, 17.55, annex A (1997) and in SHIHATA, *supra* note 16, at 271.

and groups affected by the organization.⁴⁶ Although the Inspection Panel's mandate only includes the examination of the World Bank's compliance with its policies and procedures, it allows third parties to participate in the decision-making process of the organization for the first time. This development has fundamentally altered the relationship between international organizations on the one hand and private individuals and groups on the other.

The ripple effect on the global decisionmaking process of having the same major shareholders in each of the MDBs is evident in this context. When the World Bank began preparing its action plan in 1993, ADB appointed the Task Force on Improving Project Quality in April 1993 to review ADB's portfolio of projects.⁴⁷ The report of the Task Force mirrored many of the findings of the Wapenhans Report.⁴⁸ IDB followed the World Bank in 1994 by establishing its own independent investigation mechanism, which consisted of a permanent roster of individuals to conduct investigations.⁴⁹ As IDA's 10th replenishment negotiation process was under way, ADB successively adopted policies on Confidentiality and Disclosure of Information in September 1994,⁵⁰ Governance in

46. See SHIHATA, *supra* note 16; David Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People*, 4 CHI. J. INT'L L. 201 (2003).

47. ADB, *Report of the Task Force on Improving Project Quality*, ADB Doc. Sec. M14-94, at 2 (Mar. 14, 1994), available at http://www.adb.org/Documents/Policies/Project_Quality/project_quality.pdf (last visited Aug. 5, 2005).

48. The Task Force found *inter alia*: (i) Practices placed excessive emphasis on achieving annual levels of programmed lending, creating an "approval culture," which can result in inadequate project design and insufficient consideration of local needs, demands, and absorptive capacities; (ii) Full "ownership" of projects by DMCs was often lacking as a result of their insufficient involvement in project design and their inadequate commitment of financial and human resources; (iii) ADB accorded project administration less importance than project processing, a byproduct of the approval culture; and (iv) ADB had not fully utilized feedback on the lessons of past experiences in programming, project design, and implementation activities. *Id.* at 33-37, ¶¶ 99-114.

49. IDB, *IDB's Independent Investigation Mechanism (IIM)*, at http://www.iadb.org/aboutus/iii/independent_invest/independent_invest.cfm?language+english (last visited Aug. 5, 2005). See also the rules and procedures of IDB's IIM, at <http://www.iadb.org/cont/poli/mechanism.pdf> (visited Aug. 5, 2005) [hereinafter IDB IIM Rules and Procedures].

50. ADB, *Confidentiality and Disclosure of Information*, ADB Doc. R134-94 (Aug. 18, 1994); ADB, *Information Policy and Strategy of Asian Development Bank*, ADB Doc. R143-94 (Aug. 26, 1994). These two policies were replaced by ADB, *The Public Communications Policy of the Asian Development Bank*, ADB Doc. R101-05 (Apr. 1, 2005), available at <http://www.adb.org/Documents/Policies/PCP/PCP-R-Paper.pdf> (last visited Aug. 5, 2005).

October 1995,⁵¹ and the Establishment of the Inspection Function in December 1995.⁵²

The other MDBs came to organize similar systems: the International Finance Corporation (IFC) and the Multilateral Investment and Guarantee Agency (MIGA), in 1999, with the Office of the Compliance Advisor/Ombudsman;⁵³ EBRD, in 2003, with its Independent Recourse Mechanism;⁵⁴ and AfDB, in June 2004, with its Independent Review Mechanism.⁵⁵ ADB's new Accountability Mechanism replaced its 1995 Inspection Function⁵⁶ in 2003.⁵⁷

With increased participation in the global decision process from nonstate entities like NGOs, demands for, and policies on, transparency, accountability, and participation expanded globally. Accountability has thus become the necessary complement to the principle of good governance.⁵⁸

51. ADB, *Governance: Sound Development Management*, ADB Doc. R151-95 (Aug. 17, 1995), available at <http://www.adb.org/documents/policies/governance/govpolicy.pdf> (last visited Aug. 5, 2005).

52. See ADB, *Establishment of an Inspection Function*, ADB Doc. R225-95 (Nov. 10, 1995), available at http://www.adb.org/Documents/Policies/Inspection/inspection_policy.pdf (last visited Aug. 5, 2005) [hereinafter *1995 Inspection Function*].

53. IFC/MIGA's Office of the Compliance Advisor/Ombudsman, <http://www.cao-ombudsman.org> (last visited Aug. 5, 2005). See also Compliance Advisor/Ombudsman (CAO), *Operational Guidelines* (April 2004), at <http://www.cao-ombudsman.org/CAO%20Operational%20Guidelines%20english%203-31-FINAL.pdf> (last visited Aug. 5, 2005).

54. EBRD, *Independent Recourse Mechanism: As Approved by the Board of Directors on 29 April 2003* (2003), at <http://www.ebrd.com/about/irm/about/irm.pdf> (last visited Aug. 5, 2005); EBRD, *Independent Recourse Mechanism Rules of Procedure: As Approved by the Board on 6 April 2004* (2004), at <http://www.ebrd.com/about/irm/about/procedur.pdf> (last visited Aug. 5, 2005) [hereinafter *EBRD IRM Rules of Procedure*].

55. In June 2004, AfDB's Board of Directors approved a resolution [hereinafter AfDB IRM Resolution] to establish an independent compliance review and problem-solving mechanism [hereinafter AfDB Independent Review Mechanism]. In June 2004, AfDB's Board of Directors also approved AfDB's *Compliance Review and Mediation Unit of the Independent Review Mechanism Operating Rules and Procedures* [hereinafter *AfDB IRM Operating Rules and Procedures*].

56. *1995 Inspection Function*, *supra* note 52. The 1995 *Inspection Function*, modeled after the IDB's mechanism, did not effectively handle its first full-scale inspection case involving the Samut Prakarn Wastewater Management Project in Thailand. For a discussion of this case, see Kenji Fukuda, *Critical Analysis of the New Accountability Mechanism of the Asian Development Bank*, in FOCUS ASIEN No. 16: A HANDBOOK ON THE ASIAN DEVELOPMENT BANK: THE ADB AND ITS OPERATIONS IN ASIA AND THE PACIFIC REGION 31 (Dorothy Guerrero ed., 2003).

57. *New ADB Accountability Mechanism*, *supra* note 16, ¶ 144.

58. See *First Report*, *supra* note 4, at 601–02. The Commission on Global Governance has defined “good governance” as “a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements” OUR GLOBAL NEIGHBOURHOOD 2 (The Comm’n on Global Governance ed., 1995).

III. THE LEGAL REGIME FOR THE DETERMINATION OF RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS

There is no question that international organizations are subjects of international law⁵⁹ and “as such,” in the words of the ICJ in the *WHO* case,⁶⁰ “are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”⁶¹ Efforts to assess the international responsibility, tortious or otherwise, of international organizations in general, and MDBs in particular, under international law encounter two basic obstacles. One is the state of the existing applicable law and the other is the structure of arbitration for settlement of disputes.

A. *The Applicable Law of International Organizations*

1. General Framework

There are essentially five kinds of relationships that international organizations fashion in carrying out their respective functions at various levels of operations: the organization’s relationship with (i) its member states; (ii) its staff; (iii) its non-member states and other international organizations; (iv) nonstate private entities under contracts; and (v) other third parties, i.e., private individuals and groups. For each category of relationship, different sets of law will apply.

Within the international organization, the basic constituent instrument of the organization, general international law, the headquarters agreement with the host state, and the internal law of the organization govern its relationship with its member states in the conduct of its operations. An MDB’s relationship with its borrowing member countries under any project financing is governed by general international law, the respective loan and technical assistance agreements, and any other

59. Reparation for Injuries Suffered in the Service of the United Nations, *supra* note 1. But the powers of international organizations are subject to the “principle of speciality.” The ICJ opined:

[T]o ascribe to the WHO the competence to address the legality of the use of nuclear weapons . . . would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, 79, ¶ 25 (July 8), available at <http://www.icj-cij.org/icwww/icses/ianw/ianwframe.htm>.

60. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20) [hereinafter *WHO case*].

61. *Id.* at 89–90, ¶ 37.

project agreements, as well as the applicable law governing the relationship with its member states.⁶² Since the relationship between the organization and its staff is contractual, the internal law of the organization, particularly its staff regulations and the particular employment contract concerned, is the primary legal framework in which the rights and duties of the organization are determined vis-à-vis its employees.⁶³

Outside the organization, general international law and bilateral agreements with non-member states and other international organizations govern its relationships. Local law, subject to the headquarters agreement with the host state, and contracts regulate the organization's relationship with private entities.

The MDB's relationship with third parties depends on its degree of responsibility. The questions of accountability and transparency of an MDB primarily arise in areas where its relationship with member states conjoins with its external relations with private individuals and groups of member states.⁶⁴ In these areas, the applicable law of international organizations varies depending on the circumstances of interaction and the nature of activities, and different kinds of responsibility and legal consequences will ensue.⁶⁵

Many activities undertaken or contracted out by an international organization in the host state are subject to local law. Article III, section (7)(b) of the headquarters agreement between the United Nations and the United States, which is the genesis of most headquarters agreements for international organizations, illustrates the relationship of international organizations with local law. It states, "Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the headquarters district."⁶⁶ This provision must, in turn, be read in conjunction with both the Charter of the United Nations and the Convention on Privileges and

62. The immunity of an MDB does not extend to "the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities." ADB Charter, *supra* note 31, art. 50.1.

63. *de Merode v. World Bank*, World Bank Admin. Trib. Rep., Decision No. 1, at ¶¶ 27–28 (1981).

64. For a discussion on the need to restrict the scope of immunity of an international organization, see Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass*, 51 INT'L & COMP. L.Q. 1 (2002).

65. The difficulty of MDBs' relationship with private parties in the territories of DMCs are compounded by their respective relationship with member states since the essence of the legal relationship as a host state and an international organization is "a body of mutual obligations of cooperation and good faith." WHO case, *supra* note 60, at 93, ¶ 43.

66. Agreement Regarding the Headquarters of the United Nations, June 26, 1947, 11 U.N.T.S. 11.

Immunities of the United Nations,⁶⁷ which safeguard the full and independent exercise of the organization's operations, administration, and performance of its functions by recognizing a rulemaking or regulatory competence within the headquarters seat. The United Nations "has never recognized Article III, Section 7(b) of the Headquarters Agreement as imposing local law upon contracts concluded at the Headquarters."⁶⁸ All MDBs follow the same practice.

For implementing the responsibility of international organizations, the applicable law in the *contractual* relations between an international organization and private parties is the contract concerned and general principles of both public and private international law.⁶⁹ The importance in international law of the contract, both *qua* contract and, in a sense, *qua* legal system, cannot be overstated. In the *Saudi Arabia v. ARAMCO* arbitration,⁷⁰ the tribunal held that "the Concession has the nature of a constitution which has the effect of conferring acquired rights on the contracting Parties" because of "its particular importance owing to the fact that it fills a gap in the legal system of Saudi Arabia with regard to the oil industry."⁷¹ The tribunal also emphasized the need to resort to the

67. U.N. Secretariat, Office of Legal Aff., *Law Applicable to Contracts Concluded by the United Nations with Private Parties—Procedures for Settling Disputes Arising out of such Contracts—Relevant Rules and Practices*, 1976 U.N. JURID. Y.B. 159, 160 [hereinafter UN Legal Opinion].

68. *Id.* at 161. Likewise, article V, section 15 of the Headquarters Agreement between ADB and the Republic of the Philippines provides, "The laws of the Republic of the Philippines shall apply within the headquarters seat, and the courts of the Republic of the Philippines shall have jurisdiction over acts done in the headquarters seat *except as otherwise provided in this Agreement* (emphasis added)." Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank (Dec. 22, 1966), at http://www.adb.org/Documents/Reports/Charter/ADB_Phil_Agreement.pdf (last visited Aug. 5, 2005). Section 16 provides:

The headquarters seat shall be inviolable, and shall be under the control and authority of the Bank, to the extent provided in this Agreement. The [B]ank shall have the power to make rules and regulations operative within the headquarters seat for the full and independent exercise of its operations, administration and performance of its functions.

The first sentence of section 16 must be read with section 15 as applicable to the headquarters seat unless otherwise provided in the Headquarters Agreement. The second sentence of section 16 does not displace the jurisdiction of section 15; rather it is designed to accommodate ADB's need for "the full and independent exercise of its operations, administration and performance of its functions" by recognizing a rulemaking or regulatory competence within "the headquarters seat." This recognition, however, only applies for matters ancillary to the ADB's exercise of operations, administration, and performance of its functions.

69. U.N. Legal Opinion, *supra* note 67, at 161.

70. *Saudi Arabia v. ARAMCO*, 27 I.L.R. 117 (Arb. Trib. 1958).

71. *Id.* at 168.

general principles of law in case of doubts concerning the content or the meaning of the agreement between the contracting parties.⁷²

In dealing with *non-contractual* liability claims of private third parties, the applicable law is local law and international law relating to the organization's obligation. As a practical matter, therefore, all international organizations are subject to the general reach of the local law of their host state or of the state in which they carry out their activities, subject to the competence to make rules and regulations necessary for the performance of their functions within their respective headquarters seats.⁷³

2. The Limited Applicability of the Principles of State Responsibility

The notion of responsibility of international organizations encompasses the responsibility they incur for their wrongful acts under international law.⁷⁴ It accordingly corresponds in principle to the responsibility of states for internationally wrongful acts. In this respect, the principles of state responsibility are applicable *mutatis mutandis* to international organizations, with necessary modifications due to the inherent character of such organizations.⁷⁵

There are, however, several fundamental differences in attributing responsibility to international organizations. Apart from a situation in which the United Nations is acting as an administering authority over a territory and its inhabitants (e.g., in Cambodia in 1992 and East Timor in 1999),⁷⁶ an international organization only has territorial jurisdiction over a limited physical area recognized as the "headquarters seat" under its

72. *Id.*

73. A legal opinion issued by the Office of Legal Affairs summarizes the United Nations' practice, stating in part:

In the case of commercial contracts, express reference has rarely been made to a given system of municipal law. The standard practice is for the contract to contain no choice of law clause as such; provision is made, however, for the settlement of disputes by means of arbitration when agreement cannot be reached by direct negotiations.

U.N. Legal Opinion, *supra* note 67, at 162.

74. *Report of the International Law Commission on the Work of its Fifty-fourth Session*, U.N. GAOR, 57th Sess., Supp. No. 10, ¶ 465 U.N. Doc. A/57/10 (2002).

75. J. de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 531, 595 (Max Sørensen ed., 1968); Clyde Eagleton, *International Organizations and the Law of Responsibility*, in 76 *RECUEIL DES COURS* 323, 325 (1950); MOSHE HIRSCH, *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARDS THIRD PARTIES: SOME BASIC PRINCIPLES* 11 (1995).

76. S.C. Res. 745, U.N. Doc. S/RES/745 (Feb. 28, 1992), whereby the United Nations Transitional Authority in Cambodia (UNTAC) was established; S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999), whereby the United Nations Transitional Administration in East Timor (UNTAET) was established.

agreement with its host state. The responsibility of international organizations, therefore, cannot be determined by the traditional principle of territorial sovereignty,⁷⁷ as their activities are primarily conducted either in the territory of the host state or in the territories of other states under an agreement on the purpose, scope, and duration of their operations.⁷⁸ Member states, in whose territories international organizations operate, usually participate in various decisionmaking processes to plan a course of action and implement choices concerning the allocation of funds, facilities, and personnel.

On the responsibility issue, all MDBs' grant-financing operations include a disclaimer provision in their respective agreements whereby the organization disavows any liability.⁷⁹ While it is theoretically possible for private third parties to lodge claims against the host government within domestic judicial processes, to do so is to substitute the responsibility of an international organization for that of the host state. Professor Ian Brownlie thus cautions: "There is no evidence of a presumption in law that the United Nations bears either an exclusive or a primary responsibility for the tortious acts of [its peacekeeping] forces, and the law remains undeveloped. In practice the United Nations has accepted responsibility for the acts of its agents."⁸⁰

77. See, e.g., *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9); *id.* at 22: "[E]very State's obligation [is] not to allow knowingly its territory to be used for acts contrary to the rights of other States"; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 118 (June 21) [hereinafter *Namibia Advisory Opinion*] ("Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."); *Trail Smelter Arbitration (U.S. v. Can.)*, 35 AM. J. INT'L L. 684, 716 (1941) ("[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.").

78. This does not apply when the United Nations acts as a transitional administering authority, as in the cases of Cambodia and East Timor. See S.C. Res. 745, *supra* note 76; S.C. Res. 1272, *supra* note 76.

79. The United Nations Development Programme's Basic Document for Provision of Technical Assistance and ADB's Technical Assistance Framework Agreement invariably include an indemnity clause similar to the following:

The Government shall be responsible for dealing with any claims arising out of, or resulting from, any Technical Assistance which may be brought by third parties against the Bank or any Consultants. The Government shall indemnify the Bank and the Consultants against any costs, claims, damages or liabilities arising out of, or resulting from, any acts or omissions in connection with any Technical Assistance, except where it is agreed by the Government and the Bank that such acts or omissions amount to gross negligence or willful misconduct of such Consultants.

See also Arsanjani, *supra* note 9, 140 nn.26–27.

80. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 655 (6th ed. 2003). The practice Professor Brownlie refers to concerns the wrongful acts of soldiers of the UN

3. The Applicability of Customary International Law

That international organizations are not parties to most treaties presents a glaring contradiction to the professed principle of responsibility of international organizations under international law. If they are not bound by most treaties, what are the applicable laws regulating the conduct of international organizations? What remains is customary international law, which creates obligations for international organizations in addition to those they voluntarily assume under international treaty law. International organizations are, as stated by the ICJ in the *WHO* case, "bound by any obligations incumbent upon them" under customary international law.⁸¹

The need remains to clarify the specific obligations incumbent upon international organizations under customary international law, as "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."⁸² We begin with the Universal Declaration of Human Rights, which is declaratory of customary international law and thus binding upon international organizations.⁸³ As such, activities which violate human rights, even those authorized by the governing bodies of organizations, might be brought within the confines of *excès de pouvoir*.⁸⁴ In its 1971 *Namibia Advisory Opinion*,⁸⁵ the ICJ indicated the range of possible development in the treatment of rights violations by

Force in the Congo. A Belgian claimed that his property had been burned and looted by the UN Force, and in 1962 he lodged a claim against the United Nations for compensation. *M. v. Organisation des Nations Unies et l'État Belge*, 45 INT'L L. REP. 446 (1972). The United Nations initially disputed the facts of the claim, but, after intercession by the Belgian government, the UN declared it was prepared to "accept financial liability where the damage is the result of action taken by agents of the United Nations in violation of the laws of war and the rules of international law." *Id.* The real reason for the paucity of international organization tort law cases appears to be that claimants accept the terms of a final settlement agreed upon before resolution of the matter through arbitral or judicial processes. In this case, the claimant refused to accept a settlement and brought an action against the United Nations and the Belgian government. The Civil Tribunal of Brussels dismissed the plaintiff's claim by stating, "one cannot see where the U.N. could be sued, nor how, nor on what legal basis . . . so long as it shelters behind its immunity from jurisdiction." *Id.* at 455.

81. WHO case, *supra* note 60, at 89–90, ¶ 37.

82. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 96, ¶ 179 (June 27) [hereinafter *Nicaragua* case].

83. W. Michael Reisman, Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

84. See MCDUGAL, LASSWELL & CHEN, *supra* note 18, at 334. See also HIRSCH, *supra* note 75, at 88–95; Ebere Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AM. J. INT'L L. 239 (1983); Arsanjani, *supra* note 9, at 153–57; Elihu Lauterpacht, *The Legal Effect of Illegal Acts of International Organisations*, in CAMBRIDGE ESSAY IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 88, 94–99 (1965).

85. *Namibia Advisory Opinion*, *supra* note 77.

international organizations. Notwithstanding its overt protestation that "the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned,"⁸⁶ the ICJ went on to actually review the lawfulness of certain resolutions by the General Assembly and the Security Council under international law.⁸⁷

Given the overriding goal of poverty reduction, to which MDBs such as the World Bank and ADB are committed as international institutions, article 25(1) of the Universal Declaration of Human Rights must be a point of departure for analyzing responsibility:

Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁸⁸

Moreover, the United Nations General Assembly resolved that "the right to development is an inalienable human right" and that "states have the duty to take steps individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development."⁸⁹ Out of several provisions of the Declara-

86. *Id.* at ¶ 89.

87. McDUGAL, LASSWELL & CHEN, *supra* note 18, at 335, 357. See Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150 (June 8) [hereinafter the IMCO case]; Certain Expenses of the United Nations, 1962 I.C.J. 151 (July 20) (reviewing the lawfulness of acts of constituent bodies of international organizations).

88. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 25, U.N. Doc. A/810 (Dec. 12, 1948). See, e.g., John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 32-37 (B. Ramcharan ed., 1979) (discussing the Universal Declaration's effect as custom). In his separate opinion in the Namibia Advisory Opinion, Vice-President Ammoun elaborated as follows:

Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Article 38, paragraph 1(a), of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1(b) of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1(b), of the Statute.

Namibia Advisory Opinion, *supra* note 77, at 67, 76. See also Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24).

89. Declaration on the Right to Development, G.A. Res. 41/128, annex, 41 U.N. GAOR, 97th plen. mtg., Supp No. 53 at 186, U.N. Doc. A/41/53 (Dec. 4, 1986). The UN Secretary-General urged the International Financial Institutions to gradually "incorporate human

tion relevant to MDBs, the following two articles in particular are highlighted:

Article 2(1): Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 28: Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 28 indicates, according to Christine Chinkin, “[t]he imprecision that fails to specify upon whom the duty to ensure the entitlements lies allows for flexibility and for an inclusive, progressive interpretation that assumes obligations upon states and non-state actors (including international governmental organizations, non-governmental organizations, and multinational corporations) in ensuring the prescribed social order.”⁹⁰ The implementation of the Stockholm Declaration on the Human Environment of 1972,⁹¹ the Rio Declaration on Environment and Development,⁹² and Agenda 21⁹³ are part of global efforts to further bolster the right of sustainable development to which MDBs are committed.

Customary international law is by definition of “a soft, indeterminate character,”⁹⁴ and the concept of sustainable development⁹⁵ is perforce

rights criteria in [their] work at all stages, including in project and policy lending, preparation of guidelines, as well as in project and policy appraisal, monitoring and assessment.” The Secretary-General, *Report of the Secretary-General in Pursuance of Resolution 1994/37 on The Realization of Economic, Social and Cultural Rights*, ¶ 248, U.N. Doc. E/CN.4/Sub.2/1995/10 (July 4, 1995).

90. Christine Chinkin, *The United Nations Decade for the Elimination of Poverty: What Role for International Law?*, 54 CURRENT LEGAL PROBS. 553, 559 (2001). The ICJ concluded that a state is bound by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in the exercise of its jurisdiction outside its own territory. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. ¶¶ 111–12 (July 9), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited Aug. 5, 2005).

91. Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF/48/14/Rev.1 (June 16, 1972), available at <http://www.unep.org/Documents/?DocumentID=97&ArticleID=1503> (last visited Aug. 5, 2005).

92. Declaration of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (June 14, 1992), available at <http://www.unep.org/Documents/?DocumentID=78&ArticleID=1163> (last visited Aug. 5, 2005).

93. Agenda 21, U.N. Doc. A/CONF.151/26 (vols. I–III), available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (last visited Aug. 5, 2005).

94. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 29 (1995), quoted in *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

95. See, e.g., Günther Handl, *Sustainable Development: General Rules versus Specific Obligations*, in *SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW* 35 (Winifred Lang

subject to creative interpretation. Indeed, the interpretation of such a concept, as observed by the *Namibia Advisory Opinion*, "cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law."⁹⁶ Thus, in the *Gabčíkovo-Nagymaros* case,⁹⁷ the ICJ focused on the process of decisionmaking as the key legal element in reconciling "economic development with protection of the environment" in the concept of sustainable development.⁹⁸ The ICJ therefore required the parties, in the interest of sustainable development, to "look afresh" at environmental consequences in order to "maintain the quality of the water of the Danube and to protect nature" in conformity with "the norms of international environmental law and the principles of the law of international watercourses."⁹⁹

The ICJ maintained its formal statement that it must examine "the practice and *opinio juris* of States"¹⁰⁰ and satisfy itself that "the existence of the rule in the *opinio juris* of States is confirmed by practice."¹⁰¹ That

ed., 1995); PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 84-97 (2nd ed. 2002); *Case Concerning the Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 88 (Sept. 25) (separate opinion of Judge Weeramantry) [hereinafter *Gabčíkovo-Nagymaros* case]. "If the fundamental tenet of the Rio Conference is to be taken seriously, sustainable development as the overriding policy objective must be recognized as achievable only in a social setting that allows for public participation, citizen access to information, a significant measure of decentralization of power, and governmental accountability." Günther Handl, *Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio*, 5 COLORADO J. INT'L ENVTL. L. & POL'Y 305 (1994). See also Günther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INT'L ENVTL. L. 3 (1990).

96. *Namibia Advisory Opinion*, *supra* note 77, at 31, ¶ 53 (emphasis added). See also 1 OPPENHEIM'S *INTERNATIONAL LAW* 25-26 (Sir Robert Jennings & Sir Arthur Watts eds., 1996).

97. *Gabčíkovo-Nagymaros* case, *supra* note 95.

98. *Id.* at 78, ¶ 140. See also the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. U.S.), 1984 I.C.J. 246, at 299, ¶ 111 (Oct. 12).

99. *Id.* at 78, ¶¶ 140-141. The determination of what constitutes the violation of norms of customary international law by domestic courts is, however, rather restrictive, as indicated in a series of decisions in tortious liability claims under the Alien Tort Claims Act of the United States. 28 U.S.C. § 1350. The District Court for the Southern District of New York noted in *Flores v. Southern Peru Copper Corp.* that in order to allege a violation of customary international law, "a plaintiff must demonstrate that a defendant's alleged conduct violated 'well-established, universally recognized norms of international law.'" *Flores*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002). Previously, the same court in *Amlon Metals, Inc. v. FMC Corp.* rejected the Stockholm Principles as evidence of customary international law because they "do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations." 775 F. Supp. 668, 671 (S.D.N.Y. 1991). Likewise, the U.S. Court of Appeals for the Fifth Circuit rejected the Rio Declaration and Agenda 21 as "a general sense of environmental responsibility" and "abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts . . ." *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). See also *Flores*, 414 F.3d at 206.

100. *Nicaragua* case, *supra* note 82, at 97, ¶ 183.

101. *Id.* at 98, ¶ 184.

said, the ICJ elaborated, “*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions.”¹⁰² On this, the ICJ further stated:

The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution [sic] by themselves.¹⁰³

Accordingly, the ICJ concluded that the principle of non-use of force, for example, embodied in these resolutions “may thus be regarded as a principle of customary international law.”¹⁰⁴

The Stockholm Principles, the Rio Declaration, and Agenda 21 should therefore be understood in the context of the development of law, as indicated in the *Namibia Advisory Opinion*,¹⁰⁵ the *Gabčíkovo-Nagymaros* case,¹⁰⁶ and the WTO Appellate Body’s decision in the *Shrimp/Turtle* case.¹⁰⁷ Focusing “on the components of sustainable development, rather than on the concept itself” would be more conducive to developing the law in accordance with the Rio Declaration.¹⁰⁸

102. *Id.* at 99–100, ¶ 188. See also Christine Chinkin, *The Role of Non-Governmental Organisations in Standard Setting, Monitoring and Implementation of Human Rights*, in *THE CHANGING WORLD OF INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY: A TRIBUTE TO THE LATE KENNETH R. SIMMONDS* 45 (Joseph J. Norton, Mads Andenas & Mary Footer eds., 1998); Isabelle R. Cunnig, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT’L L. 211 (1991).

103. *Nicaragua case*, *supra* note 82, at 100, ¶ 188. For antecedents in earlier ICJ cases, see *Namibia Advisory Opinion*, *supra* note 77, at 31–32, ¶¶ 52–53; *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 30 (Oct. 16). See K. Wolfe, *Some Persistent Controversies Regarding Customary International Law*, 24 NETH. Y.B. INT’L L. 1 (1993). Compare Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348, 361–370 (1987) with Thomas Frank, *Some Observations on the ICJ’s Procedural and Substantive Innovations*, 81 AM. J. INT’L L. 116, 118–19 (1987).

104. *Nicaragua case*, *supra* note 82, at 100, ¶ 188.

105. *Namibia Advisory Opinion*, *supra* note 77, at 31, ¶ 53.

106. *Gabčíkovo-Nagymaros case*, *supra* note 95.

107. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle Case*], which interpreted “exhaustible natural resources” of art. XX(g) of the GATT 1994 to include “living or non-living” natural resources consistent with “the objective of sustainable development.” *Id.* at ¶¶ 127–131. The Appellate Body invoked the principle of effectiveness in treaty interpretation. *Id.* ¶ 131. See MYRES S. MCDUGAL, HAROLD D. LASSWELL & JAMES C. MILLER, *THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* 184 (2d ed. 1994).

108. BIRNIE & BOYLE, *supra* note 95, at 96.

B. Structural Limitations on a Private Third Party's Overall Access to International Fora

Notwithstanding the increased scope of access to international fora accorded to private individuals and entities under international law¹⁰⁹ through bilateral and international arrangements,¹¹⁰ the real gatekeeper of this access is still the power of state. As Professor Michael Reisman wrote, "arbitration is not a *deus ex machina*."¹¹¹ The institutions of international arbitration, whether commercial or otherwise, must be constructed out of "components supplied by the international *political* system."¹¹² Even though individual instances of international arbitration are contingent on the consent of the parties to a dispute, "the arbitral system itself is created and sustained by state institutions."¹¹³

It is obvious that the major inhibiting factor is political. "In general," observed Professor Ian Brownlie, "it is unlikely that governments will allow claims by individual citizens against other States to go forward without retaining a right of control and veto."¹¹⁴ Thus, the disposition of private third parties' claims against an international organization over its activities in the territory of a member state must necessarily be contingent upon the support of state institutions.¹¹⁵

Although international law governs the tortious responsibility of international organizations, judicial fora rarely entertain claims initiated by an aggrieved individual. As ADB's Administrative Tribunal stated in

109. BROWNIE, *supra* note 80, at 57–58; ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 48–55 (1994). "There is no general rule that the individual cannot be a 'subject of international law,'" but such classification cannot be helpful because "this may seem to imply the existence of capacities which do not exist and does not avoid the task of distinguishing between the individual and other types of subject." BROWNIE, *supra* note 80, at 65.

110. Such agreements include instruments establishing the Iran-United States Claims Tribunal in 1981 and the European Commission of Human Rights in 1953. See Olufemi Elias, *General International Law in the European Court of Justice: From Hypothesis to Reality?*, 31 NETH. Y.B. INT'L L. 3, 30–33 (2000); ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 161–294 (1995).

111. W. Michael Reisman, *International Arbitration and Sovereignty*, 18 ARB. INT'L 231, 235 (2002). See *First Report*, *supra* note 4, at 603 ("[T]he ultimate decision to raise and effectively implement accountability will always remain a political one . . .").

112. Reisman, *supra* note 111.

113. *Id.*

114. Ian Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction*, 11 INT'L & COMP. L.Q. 701, 720 (1962).

115. See *First Report*, *supra* note 4, at 603 ("[T]he ultimate decision to raise and effectively implement accountability will always remain a political one, both in the hand of an IO [international organization], through a decision of its most representative organ, or by one of its counterparts.").

Cynthia Bares et al. v. Asian Development Bank,¹¹⁶ “The Tribunal is not authorized to assess the international responsibility, tortious or otherwise, of an international organization on the plane of public international law, especially at the instance not of another person of public international standing, but rather upon the initiative of an aggrieved individual.”¹¹⁷

In short, private individuals and groups are still dependent on a protecting state for access to international arenas. The inherent contradiction in the protection of nationals by states is that such protection does not apply to the nationals of the state in which human rights deprivations are taking place. A.H. Robertson makes the point starkly:

The real party in interest, if a violation occurs, is the individual whose rights have been denied; and the violation will in all probability have been the act of the authorities of his own government. Under the classic concept of international law the individual has no *locus standi*, on the theory that his government will champion his rights. But how can his government be his champion, when it is *ex hypothesi* the offender? What is necessary therefore is to give the individual a right of appeal to an international organ, which is competent to call the offending party to account.¹¹⁸

The same inherent contradiction equally exists in the lodging of claims against an international organization operating within the member state of private claimants. In the case of the United Nations' Congo operations in 1965, it was the Belgian government that negotiated the level of compensation for its claimants even as it shared the obligation to compensate them.¹¹⁹ In the normal context of an MDB's operations, the government is the owner of the project, and the government and the MDB agree upon its financing and implementation. It is natural for the government to protect its rights. Therefore, in its judgment in the *Marvrommatis Palestine Concessions* case, the Permanent Court of International Justice observed: “By taking up the case of one of its subjects and by resorting to diplomatic action or international proceedings on his behalf, a State is in reality asserting its own rights—its right to

116. *Bares*, Decision No. 5 (Mar. 31, 1995), reprinted in *ASIAN DEV. BANK ADMIN. TRIBUNAL REP.* 53 (1997).

117. *Id.* at ¶ 17.

118. A. H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* 72–73 (1972), quoted in *McDOUGAL, LASSWELL & CHEN*, *supra* note 18, at 193.

119. See *M. v. Organisation des Nations Unies et l'État Belge*, *supra* note 80.

ensure, in the person of its subjects, respect for the rule of international law."¹²⁰

Nonetheless, that international organizations are responsible for their own conduct under international law is clearly stated in the *Advisory Opinion on Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*:¹²¹

Finally, the Court wishes to point out that *the question of immunity from legal process is distinct from the issue of compensation for any damages* incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.¹²²

The identification of the applicable law notwithstanding, no recourse to national courts will be available unless international organizations waive their immunity or organize some form of dispute settlement mechanism by agreement. Article VIII of the Convention on the Privileges and Immunities of the United Nations referred to above "only says that the UN should provide some procedure for dispute settlement, with no reference to specific methods."¹²³ In the case of the United Nations' claims against governments of states alleged to have caused injuries to its staff during its operations, the great majority of these claims were not settled and the states did not agree to arbitration.¹²⁴ And, on its part, the UN legislated to limit its tort liability concerning its headquarters district,¹²⁵ where it is obliged to indemnify the victim in:

any tort action or in respect of any tort claim by any person against the United Nations or against any person, including a corporation, acting on behalf of the United Nations, to the extent that the United Nations may be required to indemnify such person,

120. *Marvrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A), No. 2, at 12 *quoted in* *Nottenbohm (Second Phase)* (Liech. v. Guat.), 1955 I.C.J. 4, 24 (Apr. 6).

121. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. 62, 88-89, ¶ 66 (Apr. 29).

122. *Id.* at ¶ 66 (emphasis added).

123. *Arsanjani*, *supra* note 9, at 142.

124. *Id.*

125. Paul Szarz, *The United Nations Legislates to Limit Its Liability*, 81 AM. J. INT'L L. 739 (1987).

whether such person is a member of its staff, an expert or a contractor, arising out of any act or omission, whether accidental or otherwise, in the Headquarters district.¹²⁶

The need for the United Nations to limit its liability bolsters the rationale for the immunity it enjoys. An observer with rich inside knowledge thus explains, "the Organization must be able to carry out its functions without being inhibited by the vagaries of the liability jurisprudence of the host state."¹²⁷

Notwithstanding that these institutional limitations are embedded in the legal regime for the determination of responsibility of international organizations, MDBs have now at least opened windows of access, through their accountability mechanisms, to private individuals seeking to file complaints directly.

IV. THE MDB ACCOUNTABILITY MECHANISMS

A. *The Rationale and Objectives of the Mechanisms*

Although there is no perfect fit for an accountability mechanism for any MDB, the governing principles behind such mechanisms are broadly similar: (i) to promote transparency and accountability in the MDB's operations; (ii) to complement the policy of allowing greater access to information as well as beneficiary participation in designing and implementing projects; (iii) to provide an independent investigation of the claims of project-affected people; and (iv) to increase the credibility of the institution.¹²⁸

There is considerable uniformity among different accountability mechanisms established in the MDBs with respect to who can exercise access to the mechanism; how the mechanism is structured; the scope of authority and control; the outcome of process under the mechanism; and so on. To examine how private individuals and groups can effectively seek redress from the MDB concerned is to examine the extent to which the objective of establishing the accountability mechanism is achieved.¹²⁹

126. G.A. Res. 41/210, ¶ 1, U.N. Doc. A/RES/41/210 (Dec. 11, 1986).

127. Szarz, *supra* note 125, at 743.

128. See, e.g., *New ADB Accountability Mechanism*, *supra* note 16, ¶ 58.

129. For a more extensive exposition of a policy-oriented jurisprudence, see generally HAROLD D. LASSWELL & MYRES S. McDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992). See also W. Michael Reisman, *The View from the New Haven School of International Law*, 86 ASIL PROC. 118 (1992); Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1 (1974).

B. Clarification of Policy for the Establishment of an Accountability Mechanism

Since an accountability mechanism is an instrument to rein in the power of an international organization, any suggestion to establish such a mechanism generates many competing interests and conflicting claims of various stakeholders inside and outside an MDB. To be viable and effective, a mechanism should satisfy substantive and procedural principles to build a broader consensus among all stakeholders.¹³⁰

We suggest the following substantive principles:

- (a) *The Principle of Accountability*: An MDB is accountable, first and foremost, to all its shareholders (i.e., all member countries, whether developed or developing), and each member is in turn accountable to its taxpayers for the efficient utilization of resources mobilized from them. An MDB is also accountable to its developing member country (DMC) governments, to which technical assistance grants, loans, and other investment activities are made, and for the projects it finances or administers. DMC governments are in turn accountable to their respective citizens for the purpose and utilization of these funds. Last but not least, as development partners, both MDBs and DMC governments are accountable to the local communities in which their projects are carried out.
- (b) *The Principle of Redress*: If an MDB-assisted project (i.e., the MDB funds or administers the project) harms its ultimate beneficiaries, it is the responsibility of the owner of the project (i.e., the DMC government), to provide appropriate measures of redress where warranted. If harm is created within the institution's purview, the institution should be in a position to redress it.¹³¹ If it is within the purview of the DMC

130. Cf. BRADLOW, *supra* note 16, at 50 ("This review, which included consultations with interested parties in 10 different cities around the world, was a consequence of the political and public relations problems that [the Asian Development Bank] experienced in the Samut Prakarn case.").

131. The obligation to make full reparation is the general principle behind the consequences of an internationally wrongful act, and "the essential forms of reparation in customary law" were laid down by the PCIJ in the *Factory at Chorzów* case, as quoted by the ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in

government, the institution should seek the participation and assistance of the government to help redress the harm.

- (c) *The Principle of Development Effectiveness*: There are two aspects of effectiveness: one is organizational effectiveness and the other is operational effectiveness. (The former is included in the principle of realism as part of procedural principles below.) The lessons learned from establishing accountability on matters of noncompliance and redress in the course of project preparation, processing, or implementation must feed back to enhance development effectiveness through increased project quality and staff competence.

These three substantive principles establish the contours of common interest for all stakeholders, inside and outside the institution. The following procedural principles are suggested in order to build a broad consensus on the basis of the three substantive principles mentioned above:

- (a) *The Principle of Transparency*: An MDB cannot establish accountability unless it discloses pertinent information about the project for which project-affected people demand accountability.
- (b) *The Principle of Due Process*: Those who are allegedly affected by an MDB-assisted project should be given an appropriate forum in which their grievances can be heard. Likewise, the institution should be given an equal opportunity to respond to such grievances. Due process also demands that the affected party not be excluded from the decision process.¹³²
- (c) *The Principle of Economy and Efficiency*: Any mechanism should be organized and managed efficiently. Each MDB is under an obligation to exercise its fiduciary duty in the

kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 90, ¶ 152 (quoting *Factory at Chorzów*, Merits, Judgment No. 13, 1928 P.C.I.J. (ser. A) No. 17, at 47).

132. Article 10 of the Universal Declaration of Human Rights, *supra* note 88, provides that every person is entitled to a hearing by an independent and impartial tribunal in the determination of his rights and obligations.

administration of funds, for which each member state has reposed its trust and confidence in the MDB.

- (d) *The Principle of Realism*: This principle draws on political feasibility and administrative practicability to protect the organizational effectiveness and powers of an MDB consistent with the principle of specialty.¹³³ Any mechanism must be both politically feasible and administratively practical in the context of the existing legal regime under which the institution operates as an international organization.

C. Past Trends in Decisions Relating to Major Features of the Mechanisms

Thus far, MDBs have more or less patterned their accountability mechanisms after the basic procedural requirements established by the World Bank Inspection Panel. The absence of access to effective remedies stemming from an MDB's immunity from local jurisdiction is the essential reason for the establishment of the accountability mechanism as an *internal* mechanism, independent of local jurisdictions in which MDBs remain immune.

Viewed from the MDB's perspective, the objective of the accountability mechanism is therefore two-fold: to allow private individuals access to the MDB's internal decision process to air their complaints and to safeguard against the possibility of the MDB being held liable by any third party for material injuries allegedly sustained by private individuals. Accordingly, each MDB's policy carefully circumscribes the nature and purpose of its accountability mechanism to the undertaking of independent, but institutionally internal, administrative reviews. These reviews are not to be equated with the conduct of judicial proceedings. For example, unlike an administrative tribunal, no MDB accountability mechanism is empowered to settle disputes between contractual parties. Also, no MDB accountability mechanism can provide judicial-type remedies such as injunctions or damages for noncompliance with its policies and procedures.¹³⁴

133. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, *supra* note 59, at 78, ¶ 25.

134. The 1995 *Inspection Function* "is not intended to provide judicial-type remedies such as injunctions or money damages." 1995 *Inspection Function*, *supra* note 52, ¶ 23. Also, the role of "the panels of outside experts convened to inspect particular Bank projects will be advisory, not adjudicative, in nature." *Id.* ¶ 23. The *New ADB Accountability Mechanism* also provides that "[s]ince the compliance review is not intended to provide judicial-type remedies, such as injunctions or money damages, [the Compliance Review Panel's] findings and recommendations are not adjudicative." *New ADB Accountability Mechanism*, *supra* note 16, ¶ 61.

Given these institutional constraints, how have past decisions relating to the structure and procedures of MDB accountability mechanisms fared in meeting the substantive and procedural goals of accountability?

1. Independence of the Compliance Review Panel

Some external stakeholders, primarily members of civil society, are of the view that the World Bank Inspection Panel is not sufficiently independent¹³⁵ because of the earlier Management practice of preparing remedial “action plans.” As a former World Bank Inspection Panel member has stated:

In presenting its remedial action plans to the Panel and the Board just prior to the meeting, or at the same meeting at which the Board addresses the Panel’s recommendation, Management has made it impossible for the Panel (or the Board) to determine whether the plans do, in fact, address the concerns of the Requesters and the findings of the Panel.¹³⁶

The offering of “remedial plans” by the World Bank Management was a unique feature in the World Bank Inspection Panel system, as was the failure of the World Bank Board to restrain Management from commenting on eligibility in at least five claims.¹³⁷ In 1997, a former World Bank Inspection Panel member acknowledged:

[T]he World Bank Inspection Panel has been unable to fulfill some of the central hopes of those who initiated it. The independence of the Panel is only partial at best, with the Board often divided in supporting the statutory independence of the Panel from Management. It is indicative that the Board has not restrained Management from commenting on eligibility (a matter reserved to the Panel, with confirmation by the Board, in the Resolution) and has not prevented recurrent and last-minute introduction of ‘action plans’ that interfere with the Panel’s work. The Board and Management, in their own ways and from

135. Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 206, 217 (2002) (using the term “quasi-independent”). Similarly, Richard E. Bissell has indicated that the independence of the World Bank Inspection Panel is “only partial at best, with the Board often divided in supporting the statutory independence of the Panel from Management.” Richard E. Bissell, *Institutional and Procedural Aspects of the Inspection Panel*, in *THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE* 107, 124 (G. Alfredsson and R. Ring eds., 2001) [hereinafter *THE INSPECTION PANEL OF THE WORLD BANK*].

136. Alvaro Umana, *Some Lessons from the Inspection Panel’s Experience*, in *THE INSPECTION PANEL OF THE WORLD BANK*, *supra* note 135, at 127, 133–34.

137. UDALL, *supra* note 33, at 73.

different perspectives, are uncomfortable with the Panel being independent.¹³⁸

Under the 1995 Inspection Function, a panel of experts was a functionary of the Board Inspection Committee (BIC), a committee of the Board of Directors, and did not have its own reporting relationship with the Board; rather, the panel of experts reported to the BIC, which in turn submitted to the Board its own report on the basis of the panel's findings and recommendations. As a result, the relationship between the panel and the BIC on the one hand and the BIC and the Board on the other not only reduced the independence of the panel, but it also strained the panel's relationship with Management. Moreover, the *ad hoc* selection of the panel from a roster of experts on a case-to-case basis did not allow for the accumulation of expertise and institutional knowledge, nor did it contribute to the continuity and stability of the panel. In the end, the panel's lack of independence threatened the credibility and viability of the inspection process itself.

Under the new ADB Accountability Mechanism, ADB Compliance Review Panel members are appointed by the Board and report to the Board on all activities except those they report to the Board Compliance Review Committee (BCRC), which is restructured from the BIC.¹³⁹ The retention of a Board committee in the form of the BCRC ensures that the panel is not given unfettered discretion in carrying out its work.¹⁴⁰ Instead, a system of "checks and balances" guarantees the panel operates within the mandate provided by the Board.

2. Who Can File a Request for Compliance Review?

The World Bank Inspection Panel prescribed that eligible requesters must be "an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals)."¹⁴¹ Four other MDBs—IDB, ADB, EBRD, and AfDB—essentially followed the same rationale by requiring a group of at least two individuals who share a

138. Bissell, *supra* note 135, at 124–25.

139. The specific activities where the BCRC exercises oversight functions over the Compliance Review Panel are (i) clearing the panel's terms of reference and (ii) reviewing the panel's draft monitoring reports following its monitoring of the implementation of Board-approved decisions resulting from a compliance review.

140. Bissell, a former World Bank Inspection Panel member, notes that "[t]he Board and Management, in their own ways and from different perspectives, are uncomfortable with the Panel being independent." Bissell, *supra* note 135, at 125. This is equally true of the experience at IDB with its Independent Investigation Mechanism, and at ADB with its 1995 *Inspection Function*.

141. World Bank Inspection Panel Resolution, *supra* note 45, ¶ 12.

commonality of interests to act together in filing a complaint. Other development-related institutions have followed this majority approach, including the Japan Bank for International Corporation (JBIC) in 2003 and the Overseas Private Investment Corporation (OPIC) in 2004.¹⁴²

ADB's 1995 Inspection Function, however, not only allowed affected parties residing "in the borrowing member country in which the relevant Bank project is being or will be implemented" to file a request, but extended the right to those "in a member country adjacent to such borrowing member country."¹⁴³ ADB is the only MDB that allows affected people in a neighboring country to file a complaint in conformity with international decisions such as the *Trail Smelter* Arbitration¹⁴⁴ and the *Lake Lanoux* Arbitration.¹⁴⁵ The new ADB Accountability Mechanism of 2003 has maintained the same eligibility requirement.¹⁴⁶

3. The Basis of Complaint

a. The MDB's Noncompliance

The requirements for a complaint before an MDB on its operational activities stem from the World Bank Inspection Panel's accountability mechanism, which prescribes that the affected party:

must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal

142. See IDB IIM Rules and Procedures, *supra* note 49, ¶ 3.2; *New ADB Accountability Mechanism*, *supra* note 16, ¶¶ 68, 103; *EBRD IRM Rules of Procedure* *supra* note 54, ¶ 1(a); *AfDB IRM Operating Rules and Procedures*, *supra* note 55, ¶ 4(a); JBIC's Summary of Procedures to Submit Objections Concerning JBIC Guidelines for Confirmation of Environmental and Social Considerations, section IV.2 (Oct. 2003), at <http://www.jbic.go.jp/english/environ/pdf/objection.pdf> (last visited Aug. 5, 2005) [hereinafter JBIC Summary of Procedures]; OPIC's General Policy and Guidelines on its Accountability and Advisory Mechanism (AAM), approved by OPIC's Board of Directors in September 2004, ¶ 1, which states that the AAM's objective is "addressing the concerns of locally affected communities regarding specific OPIC projects," and ¶ 4(b), which states that "impacted communities in the host country" can request compliance review and problem-solving. In the case of IFC and MIGA's CAO, "[a]ny individual, group, community, entity, or other party affected or likely to be affected by the social and/or environmental impacts of an IFC or MIGA project may make a complaint to the CAO." See also Revised Operational Guidelines for CAO, at 10 (Apr. 2004), at <http://www.cao-ombudsman.org/CAO%20Operational%20Guidelines%20english%2031-FINAL.pdf> (last visited Aug. 5, 2005).

143. *1995 Inspection Function*, *supra* note 52, ¶ 28.

144. *Trail Smelter Arbitration*, *supra* note 77.

145. *Lake Lanoux Arbitration* (Fr. v. Spain), 24 INT'L L. REP. 101 (Arb. Trib. 1957).

146. *New ADB Accountability Mechanism*, *supra* note 16, ¶¶ 68, 103. IFC and MIGA's CAO is the only mechanism that allows a single individual to file a complaint, but this right does not cover the filing of a compliance audit.

and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.¹⁴⁷

The basis for review is limited only to a failure of *the MDB* to follow its operational policies and procedures. This limitation formally resonates with the principle of noninterference with the domestic affairs of other states.¹⁴⁸

The inspection panel or accountability mechanism of any of the MDBs does not have competence to investigate the borrower's accountability, i.e., how the borrower discharges its responsibility, how it conducts the process of implementation, and how it manages project performance as the "owner" of the project. This is so even though the MDB and the borrower share concurrent responsibility for project performance management (in terms of the MDB's responsibility for its portfolio management as the lender and the borrower's responsibility for its project management as the owner of the project). Since the mechanism's competence extends to investigating the MDB's failure to follow up on the borrower's obligations under the loan agreement, the scope of what constitutes such failure is an essentially relative question; it depends on the development of relations between the MDB and the borrower concerned, and it may not stop short of addressing the accountability of the borrower.¹⁴⁹

147. World Bank Inspection Panel Resolution, *supra* note 45, ¶ 12.

148. *But see* Nico Schrijver, *The Changing Nature of State Sovereignty*, in 70 *BRIT. Y.B. INT'L L.* 65 (2000); Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 *AM. J. INT'L L.* 1 (1968). *See also* Reisman, *supra* note 83, at 872 ("By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component.").

149. *See* *Tunis-Morocco Nationality Decrees*, Advisory Opinion, 1923 *P.C.I.J.* (ser. B) No. 4, at 24 (Feb. 7) ("The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."). Consider in this connection the development of MDBs' competence to examine and take into account "governance issues" in spite of the formal prohibition on interference "in the political affairs of any member" and the formal requirement of only "economic considerations." *See also* SHIHATA, *supra* note 43, 245–82. Prohibition of political activity is prescribed in art. 36, ¶ 2 of the ADB Charter; art. 38, ¶ 2 of the AfDB Charter; art. VIII, sec. 5(f) of the IDB Charter; and art. IV, sec. 10 of the IBRD Charter. The argument against political considerations "now has much less force, not least because of those institutions' own commitments to good governance, sustainable development, and poverty reduction." Chinkin, *supra* note 90, at 571. *See also* Handl, *supra* note 14, at 643.

b. The Allegation of Material Adverse Effect

The affected party's complaint must allege "a material adverse effect" in its request for inspection.¹⁵⁰ As the presence of "a material adverse effect" must be the result of the MDB's noncompliance with its policies and procedures, it is the panel's duty to dispose of the question of compliance first. To do otherwise would "open the door wide to claims against the Bank even when no violation of a legal obligation was ever attributed to the Bank or established by a court of law."¹⁵¹ In this respect, it is worth quoting the relevant conclusions of the World Bank Board's Second Review of the Inspection Panel:¹⁵²

13. As required by the Resolution, the Panel's report to the Board will focus on whether there is a serious Bank failure to observe its operational policies and procedures with respect to project design, appraisal and/or implementation. . . . The Panel will discuss in its written report only those material adverse effects, alleged in the request, that have totally or partially resulted from serious Bank failure of compliance with its policies and procedures

14. For assessing material adverse effect, the without-project situation should be used as the base case for comparison, taking into account what baseline information may be available. Non-accomplishments and unfulfilled expectations that do not generate a material deterioration compared to the without-project situation will not be considered as a material adverse effect for this purpose¹⁵³

The requirement of "material adverse effect" is a fundamental departure from the law of state responsibility.¹⁵⁴

150. World Bank Inspection Panel Resolution, *supra* note 45, ¶ 12.

151. SHIHATA, *supra* note 16, at 213.

152. The World Bank Inspection Panel Resolution, *supra* note 45, has gone through two reviews by the World Bank's Board of Directors. These reviews resulted in the Board's "Clarifications of Certain Aspects of the Resolution" on Oct. 17, 1996, available at http://wbln0018.worldbank.org/IPN/ipnweb.nsf/Wrelease/ABD7787B03330B66852568_D9004CC72E (last visited Aug. 5, 2005) and in the Board's *Conclusions of the Board's Second Review of the Inspection Panel* (Apr. 20, 1999), at <http://wbln0018.worldbank.org/IPN/ipnweb.nsf/Wrelease/9203E5F9E8E33EA5852568D9004B25B6> (last visited Aug. 5, 2005). See *Clarifications of Certain Aspects of the Resolution* (1996) and *Conclusions of the Board's Second Review of the Inspection Panel* (1999) reprinted in World Bank, *World Bank Operational Manual: Bank Procedures* 17.55, annex B (February 1997) and annex C (August 1999) and in SHIHATA, *supra* note 16, at 320, 323.

153. *Conclusions of the Board's Second Review of the Inspection Panel*, *supra* note 152, ¶¶ 13, 14.

154. In the *Rainbow Warrior* case, despite its initial argument that "damage is necessary to provide a basis for liability to make reparation," France recognized "in principle that there

References in the MDBs' accountability mechanisms to "a material adverse effect" are also expressed in terms of "harm," "damage," and "injury," as in the Articles on Responsibility of States.¹⁵⁵ Since an internationally wrongful act is a breach of an international obligation, an MDB's responsibility arising from its failure to follow its policies and procedures will hinge on the extent to which such policies and procedures are considered part of obligations under international law.

An MDB's operational policies and procedures serve the purpose of internal administration with a view to increasing the efficiency, effectiveness, and accountability of operations in member countries. As such, they cannot be considered part of international law unless an MDB has voluntarily assumed such obligations within international agreements.¹⁵⁶

can be legal or moral damage and that material loss is not the only form of damage in this case." Case concerning the difference between New Zealand and France concerning the interpretation of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affairs, XX R.I.A.A. 217, 266, ¶ 107, 267, ¶ 109 (Decision of Apr. 30, 1990). Both parties agreed that "the concept of damage does not possess an exclusive material or patrimonial character." *Id.* at 267, ¶ 109. Accordingly, they agreed that "[u]nlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State." *Id.* This suggests that "acts affecting the honor, dignity or prestige" of private individuals and groups are excluded from the MDB's compliance review. Consider the ILA Committee's *Third Report*, *supra* note 4, at 785 ("Responsibility of IOs [international organizations] may arise from non-compliance with any of the applicable bodies of law, while *their liability will be implicated when (significant) harm has been caused by any of the activities carried out by them.*") (emphasis added). See Commentary (6) and (7) to article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY, *supra* note 2, at 203.

155. Article 31, ¶ 1 stipulates, "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Article 31, ¶ 2 provides, "Injury includes damage, whether material or moral, caused by the internationally wrongful act of a State."

156. The UN Secretary-General unilaterally promulgated "fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control." UN Secretary-General, *Secretary General's Bulletin*, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), *reprinted in* 33 I.L.M. 1656 (1999). In *Nuclear Tests (Austl. v. Fr.)* and *Nuclear Tests (N.Z. v. Fr.)*, the ICJ opined, "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking . . ." *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, at 267, ¶ 43 (Dec. 20); *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457, at 472, ¶ 46 (Dec. 20). See BROWNIE, *supra* note 80, at 613 ("A state may evidence a clear intention to accept obligations *vis-a-vis* certain other states by a public declaration which is not an offer or otherwise dependent on reciprocal undertakings from the states concerned."). Despite the caution expressed by the Court in *North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 25 (Feb. 20), that unilateral assumption of the obligations of a convention by conduct was "not lightly to be presumed," and that "a very consistent course of conduct" was required in such a situation. The Court applied the principle recognized in the *Nuclear Tests* cases in the *Nicaragua* case, *supra* note 82, at 132, ¶261, and in the *Case Concern-*

Apart from customary international law, MDBs are rarely bound by international treaty law, as they are not normally parties to international treaties; such treaties are *res inter alios acta* and not binding on MDBs without their consent.¹⁵⁷ There are, however, new areas where MDBs have made a voluntary commitment to support and conform to various international obligations assumed by states.¹⁵⁸

c. The Nexus Between “Material Damage” and an MDB’s Failure to Comply with its Policies and Procedures

As mentioned above, an MDB’s accountability mechanism requires the establishment of a causal link between material damage and the

ing the Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, at 573–74, ¶¶ 39–40 (Dec. 22). See also BROWNIE, *supra* note 80, at 613–14.

157. See also Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 38, May 22, 1969 (“Nothing . . . precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such.”). For a fair description of how provisions of a treaty become part of international customary law, see North Sea Continental Shelf Cases, *supra* note 156, at 41–43. International treaties are normally not open for accession or ratification by international organizations other than “regional economic integration organizations,” and none of the MDBs are considered regional economic integration organizations. A *modus operandi* of accession is, however, not uniform, as shown in the United Nations Convention Against Corruption, 43 I.L.M. 37 (2004). The Convention Against Corruption stipulates that it is also open for signature by “regional economic integration organizations provided at least one member State of such organization has signed this Convention” *Id.* at 71, ¶ 2. But it allows such organizations to deposit their instruments of ratification, acceptance, or approval if at least one of its member states has done likewise. *Id.* at 72, ¶ 3. Art. 34 of the Convention on Biological Diversity allows any regional economic integration organization to become a party to the Convention without any of its member states being a Contracting Party and to be bound by all the obligations under the Convention or the protocol, as the case may be.

158. EBRD has stated in its *Public Information Policy* that it will “take into account the Aarhus Convention, the general spirit, purpose and ultimate goals of which are subscribed to by the Bank in the implementation of its *Environmental Policy*, along with other relevant international conventions.” EBRD, *Public Information Policy* at 3 (July 2003), at <http://www.ebrd.com/about/policies/pip/pip.pdf> (last visited Aug. 5, 2005). In its *Environmental Policy*, EBRD also stated:

[It will support] through investments the implementation of Agenda 21 and of relevant global and regional agreements on environment and sustainable development, including the Framework Convention on Climate Change, the Kyoto Protocol, the Convention on Biological Diversity, the Convention on Environmental Impact Assessment in a Transboundary Context, and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

EBRD, *Environmental Policy* at 13 (July 2003), at <http://www.ebrd.com/about/policies/enviro/policy/policy.pdf> (last visited Aug. 5, 2005). For a fuller exposition of normative effects that may flow from the relationship between international organizations, particularly MDBs, the nature, goal, and objectives of multilateral treaties, and the process by which these instruments have been adopted and the support they enjoy, see Handl, *supra* note 14, at 658–64.

MDB's noncompliance with its policies and procedures. The Second Review of the World Bank Inspection Panel reconfirmed the essentiality of this requirement. The Executive Directors had hitherto downplayed the panel's role "in checking compliance with operational policies" while emphasizing "its role in addressing actual or potential harm to local populations and assessing remedial actions."¹⁵⁹ The Second Review concluded that the panel would discuss "only those *material adverse effects*, alleged in the request, that have totally or partially *resulted from serious Bank failure of compliance with its policies and procedures*."¹⁶⁰ The effect of this requirement is to relieve the MDB from potential liability for damage arising from activities that are otherwise lawful or involve no wrongful acts.

4. The Prior Exhaustion of Recourse to Management

The panel can entertain a request for inspection only after it satisfies itself that "the subject matter of the request has been dealt with by the Management of the Bank and Management has failed to demonstrate that it has followed, or is taking adequate steps to follow the Bank's policies and procedures."¹⁶¹ This is equivalent, in a way, to the requirement of an exhaustion of local remedies before an individual is allowed to seek international remedies. The requirement is part of the responsibility of Management to respond to initial complaints, and it may be referred to as the principle of complementarity. It squarely places the burden on Management to dispose of the complaints of private third parties. The principle of complementarity triggers the problem-solving function, or consultation phase, referred to below,¹⁶² only when operations departments are unable or unwilling to address the complaint.

5. The Panel's Right to Visit the Project Site

MDBs' accountability mechanisms hold the right to visit a project site. Unfortunately, this right attracted significant attention in connection with ADB's Samut Prakarn inspection case.¹⁶³ This was ADB's first full-blown case, and its Inspection Panel was not able to visit the project site. ADB was criticized even though MDB accountability mechanisms at

159. *Some Lessons from the Inspection Panel's Three Years Experience*, INSP/SecM97-11 (Nov. 6, 1997), *quoted in* SHIHATA, *supra* note 16, at 175.

160. *Conclusions of the Board's Second Review of the Inspection Panel*, *supra* note 152, ¶ 13 (emphasis added).

161. World Bank Inspection Panel Resolution, *supra* note 45, ¶ 13.

162. *See infra* Part V.

163. This issue was extensively discussed during the ADB Inspection Function review process. *See External Comments Received on the Review from March to September 2002* (May 12, 2003), at <http://www.adb.org/Inspection/review.asp> (last visited Aug. 5, 2005).

AfDB, EBRD, IDB, and the World Bank contain similar restrictive provisions.¹⁶⁴

In fact, in the World Bank's initial inspection cases, the Executive Directors frequently rejected the panel's recommendations for inspection. The World Bank also requires the "prior consent" of the DMC government concerned before the panel visits the project site.¹⁶⁵ The clarification given during the World Bank's Second Review in 1999 merely states that the Board "assumes the borrowers' consent for field visits envisaged in the Resolution."¹⁶⁶ There has been only one case in which the panel's site visit was not conducted because of worries expressed by the member government concerned.¹⁶⁷ While external stakeholders, mostly NGOs and civil society groups, demand the removal of the "no objection" requirement from the panel's right to a site visit,¹⁶⁸ some DMCs are concerned that the inspection process creates a misperception that the government has done something wrong and is being inspected. Some argue that unconditionally requiring site visits infringes on the DMC's sovereignty and that DMCs have every right to turn down a visit. The revised 2003 policy reconfirms the same approach of "no objection" and the requirement of prior consent of the DMC government. Rather than imposing a compulsory site visit obligation through loan agreements, the policy assumes DMCs will routinely give consent as part of the good faith cooperation of all parties in the compliance review process.¹⁶⁹

6. The Authority of the Inspection Panel to Make a Recommendation and the Scope of Such Recommendation

The World Bank's Inspection Panel does not make any recommendations about remedial measures to the Board; it only passes judgment on the World Bank's noncompliance. Instead, it is the World Bank's Management that makes recommendations to the Board for remedial measures on the basis of the panel's report and findings.¹⁷⁰

In the earlier cases of the World Bank, Management submitted remedial action plans to the Board in response to a claimant's request for

164. ADB's 1995 policy stipulates, "Any part of the inspection to be conducted by the Panel or its consultants in the territory of a borrowing country will be carried out only if the country has no objection." *1995 Inspection Function*, *supra* note 52, ¶ 41.

165. World Bank Inspection Panel Resolution, *supra* note 45, ¶ 21.

166. *Conclusions of the Board's Second Review of the Inspection Panel*, *supra* note 152, ¶ 19.

167. WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON 245 (2003). See also SHIHATA, *supra* note 16, at 131; UDALL, *supra* note 33, at 44.

168. *New ADB Accountability Mechanism*, *supra* note 16, ¶ 55.

169. *Id.* ¶ 56.

170. World Bank Inspection Panel Resolution, *supra* note 45, at 23.

inspection *before* the panel investigated the claims; the plans related to corrective measures to be taken by the borrower rather than the World Bank.¹⁷¹ Since they focused on “the borrower’s failure and the measures to be taken by the borrower to correct them,” the plans distorted the process itself.¹⁷² In contrast, under the ADB’s 1995 policy, both the panel of experts and the BIC were authorized to make a finding on the compliance of ADB’s operational policies and procedures and submit a recommendation about remedial measures regarding the inspected project to the Board.¹⁷³

Similarly, the new ADB Accountability Mechanism authorizes the Compliance Review Panel to make “recommendations to ensure project compliance, including recommendations, if appropriate, for any remedial changes in the scope or implementation of the project.”¹⁷⁴ This is in accord with the *Chorzów* principle that jurisdiction over the breach of an obligation extends to any remedy sought in respect of the breach: “Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.”¹⁷⁵

7. A 95 Percent Disbursement Limit

The World Bank Inspection Panel,¹⁷⁶ the IDB Independent Investigation Mechanism,¹⁷⁷ and the 1995 ADB Inspection Function will not accept a request for inspection for completed projects or projects where at least 95 percent of the loan financing has been disbursed—this is known as the 95 percent disbursement limit.¹⁷⁸ This limit generated extensive discussions during ADB’s inspection function review process, particularly because the question of accountability is independent of the status of project administration or the quantum of loan proceeds disbursed. Furthermore, the cut-off limit linked to the disbursement is arbitrary and susceptible to manipulation, as a 95 percent disbursement

171. SHIHATA, *supra* note 16, at 222–23.

172. In the Second Review of the Inspection Panel by the World Bank’s Board, the Board prohibited Management from communicating with “the Board on matters associated with the request for inspection, except as provided for in the Resolution.” The Board instructed Management to “direct its response to the request, including any steps it intends to take to address its failures, if any, to the Panel.” *Conclusions of the Board’s Second Review of the Inspection Panel*, *supra* note 152, ¶ 2.

173. 1995 *Inspection Function*, *supra* note 52, ¶¶ 43–44.

174. *New ADB Accountability Mechanism*, *supra* note 16, ¶ 126.

175. LaGrand (F.R.G. v. U.S.), Merits, 40 I.L.M. 1069, 1082, ¶ 48 (Judgment of June 27, 2001) (citing *Factory at Chorzów*, 1927, P.C.I.J., (ser. A), No. 9, at 22).

176. World Bank Inspection Panel Resolution, *supra* note 45, ¶ 14(c).

177. IDB IIM Rules and Procedures, *supra* note 49, ¶ 1.5(d).

178. 1995 *Inspection Function*, *supra* note 52, ¶ 31(c).

is subject to the cancellation of a portion of the undisbursed loan amount.

The new ADB Accountability Mechanism replaces the 95 percent disbursement limit as a cut-off with the date of the issuance of a project completion report (PCR) for the ADB-assisted project. The ADB issues the PCR within 1–2 years after the project is physically completed and in operation.¹⁷⁹ The EBRD Independent Recourse Mechanism also does not adopt the 95 percent disbursement limit, instead placing the cut-off point beyond the disbursement limit but before issuance of a PCR. EBRD has adopted the cut-off of 12 months “after the date of the physical completion of the Project” or, where physical completion is not an appropriate measure, 12 months after the date of the final disbursement or cancellation of EBRD’s operation. The AfDB Independent Review Mechanism also prescribes a cut-off limit of complaints filed “12 months after physical completion of the project concerned.”¹⁸⁰

It is noteworthy that JBIC has used a cut-off point far beyond that of any MDB: a requester can file a claim of JBIC’s noncompliance with its *Guidelines for Confirmation of Environmental and Social Considerations* up to completion of disbursement; after completion of disbursement, a requester can also file a claim of JBIC’s noncompliance with its monitoring provisions during the period in which JBIC is monitoring the matter pursuant to its guidelines.¹⁸¹

8. Claimants’ Right to Rebuttal and Due Process

ADB’s 1995 Inspection Function, like the World Bank’s current Inspection Panel, did not provide an opportunity for claimants to comment on Management’s answer or the panel’s draft report. The absence of such opportunity of rebuttal was one-sided, particularly in view of the World Bank Management’s submission of a remedial action plan as part of Management’s response, as discussed earlier.¹⁸² A simple due process requirement is clearly lacking at the World Bank and IDB. The new ADB Accountability Mechanism provides for the claimant to be informed at various stages of both the consultation process and the

179. In the case of private sector projects for which a PCR is not issued, the cut-off date is two years after the project is physically completed and in operation; or, where physical completion is waived or is not relevant (e.g., financial intermediation projects), one year after the date of the final disbursement or termination of ADB’s involvement in the project, whichever occurs earlier. ADB, OPERATIONS MANUAL, OM Section L1/OP, at 4 n.1 (Oct. 29, 2003), available at <http://www.adb.org/Documents/Manuals/Operations/default.asp?p=aadb> (last visited Aug. 5, 2005).

180. *EBRD IRM Rules of Procedure*, *supra* note 54, ¶ 18; *AfDB IRM Operating Rules and Procedures*, *supra* note 55, ¶ 2(viii).

181. JBIC Summary of Procedures, *supra* note 142, sec. IV.3.

182. See *supra* notes 170–175 and accompanying text.

compliance review process; most significantly, the claimant can comment on the Compliance Review Panel's draft report after the panel has carried out a compliance review.¹⁸³ The opportunity for the claimant (as well as Management) to provide their responses to the Compliance Review Panel's draft report is a significant milestone that has hitherto been unavailable to the claimant in any MDB accountability mechanism.¹⁸⁴

9. Sanctions Provisions in the Loan Agreement

Since the loan agreement is a contractual arrangement between the MDB as the lender and the DMC as the borrower, it does not, in principle, involve third parties. Remedies available under the loan agreement are primarily for the protection of the interests of the lender. Affected individuals are outside the system of this contractual arrangement. Arguments for the inclusion of some form of sanctions in the loan agreement, such as suspension or cancellation of the loan when a compliance review is under way, are misplaced; these remedies would penalize the borrower when the object of compliance review is the lender. In fact, if the borrower fails to perform obligations under the loan agreement, remedies are available to the lender under the loan regulations.

A proper forum for the settlement of any disputes between the MDB and its borrowers, arising in connection with the performance of the loan agreement and not resolved by negotiations, is arbitration as provided for in the applicable loan regulations. The MDB's noncompliance cannot possibly be grounds for suspension or cancellation of the loan when the borrower is not at fault. The 1995 policy, therefore, provided:

Any remedial changes in project scope or implementation (or, if warranted, the suspension or cancellation of the project) will be carried out in accordance with applicable Bank procedures (which require the consent of the relevant borrower or grant recipient, except as otherwise provided in the Bank's Loan Regulations or other relevant legal documents).¹⁸⁵

The new ADB Accountability Mechanism adopted the same policy,¹⁸⁶ as did EBRD's IRM.¹⁸⁷

183. *New ADB Accountability Mechanism*, *supra* note 16, ¶ 125. See Dana Clark & David Hunter, *The World Bank Inspection Panel: Simplifying Citizen Voices for Sustainable Development*, in *THE INSPECTION PANEL OF THE WORLD BANK*, *supra* note 135, at 167, 188–89 (expanding the role of the claimants).

184. The EBRD's mechanism and AfDB's mechanism do not provide the claimant with an opportunity to comment on the expert's findings and recommendation forwarded to the President or Board, as applicable, for decision.

185. *1995 Inspection Function*, *supra* note 52, ¶ 45.

186. *New ADB Accountability Mechanism*, *supra* note 16, ¶ 128.

187. *EBRD IRM Rules of Procedure*, *supra* note 54, ¶ 22 of annex 1.

V. NEW DEVELOPMENTS IN THE STRUCTURE OF AN ACCOUNTABILITY MECHANISM

The World Bank Inspection Panel has evolved from a body that civil groups criticized before the Second Review in 1999 to one that has “given increased legitimacy to the claims of people affected by the World Bank” and has served “as a forum through which their voices have been amplified within the institution” and “a catalyst for broader change at the World Bank.”¹⁸⁸ Even so, it is still under increasing pressure from criticism that: (i) the institution should move towards “effective problem solving and greater accountability;”¹⁸⁹ (ii) the panel lacks powers of enforcement or restitution, oversight over the implementation of remedial measures, and the ability to assess whether Management’s proposed remedial measures satisfy the concerns of the claimants and/or bring the project into compliance;¹⁹⁰ and (iii) the institution should create “a problem solving unit that is responsible for remedying the social and environmental policy violations identified by the Inspection Panel and helping to ensure that displaced and aggrieved communities are adequately compensated and assisted to improve their standards of living” and engages in “solving problems, promoting compliance, and providing technical and financial assistance to borrowers and [World] Bank staff to help accomplish . . . social and environmental policy objectives.”¹⁹¹

The net result of the inspection function is that the question of internal compliance or noncompliance has become the focus of the inspection process, and the real question of accountability toward people who are affected by MDBs’ projects has become sidelined. Once the inspection function accepts the complainants’ request for inspection and authorizes an inspection, the complainants themselves are left outside the system. The affected people who requested “inspection” will eventually be informed of the outcome of the inspection process only *after* the process is completed, with the possibility that their problem will remain unresolved.¹⁹²

188. Kay Treacle, Jonathan Fox, & Dana Clark, *Lessons Learned*, in DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 247 (Dana Clark, Jonathan Fox & Kay Treacle eds., 2003).

189. *Id.* at 275.

190. Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 218 (2002). See Jonathan Fox & Kay Treacle, *Concluding Propositions*, in DEMANDING ACCOUNTABILITY, *supra* note 188, at 285.

191. Clark, *supra* note 190, at 224–25.

192. ADB made the following observation in April 2004:

Following loan closure, and after more than 1 year of investigations, the Project remains incomplete and suspended. No further action or progress has occurred on the

It is natural that complainants are more interested in having their complaints addressed and properly resolved by the MDB concerned than in the question of compliance or noncompliance. As a development financial institution, each MDB is a principal interested party in the success of a project. As such, no MDB can walk away from problems on the ground under the pretext that a government owns the project, but one must also recognize that not every problem can be resolved by an MDB alone. No major problems can be resolved without the participation, consent, and cooperation of the DMC government concerned. Yet, despite the good faith efforts of both MDBs and DMC governments, problems on the ground remain unresolved.

Thus, the issues are joined. The question of whether there should be an independent problem-solving function on top of the internal problem-solving functions performed by operations departments of the MDB is the same as the question of whether there should be an independent inspection function when all operations departments ensure internal compliance.

A. The Introduction of a Problem-Solving Function

While the World Bank Inspection Panel is focused on compliance review, problemsolving is the cornerstone of IFC and MIGA's Compliance Advisor/Ombudsman (CAO). The CAO does not focus on compliance review in terms of a compliance review claim from project-affected people.¹⁹³ The ADB Accountability Mechanism provides for both compliance and problem-solving functions, each handled by a separate entity: the

compensation plan, monitoring activities, community involvement initiatives or odor and effluent management. There is no clear indication of what the Government's next steps will be with regard to the future of the Project and when they will be taken.

Fourth Semiannual Report to the Board of Directors on the Implementation of the Recommendations of the Board Inspection Committee as Adopted on 25 March 2002, ¶ 11, (Apr. 2004), at http://www.adb.org/inspection/samut_prakarn-4thsemirep.pdf (last visited Aug. 5, 2005). With regard to the latest status of the Samut Prakarn Wastewater Management Project, ADB made the following conclusion and recommendation in June 2005: "In view of the static status of the Project in all the key monitoring aspects, it is recommended that submission of semiannual reports be discontinued as of this report. The staff will continue to monitor the Project and report the new development, if any." *Sixth Semiannual Report to the Board of Directors on the Implementation of the Recommendations of the Board Inspection Committee as Adopted on 25 March 2002*, ¶ 9, (June 2005), at http://www.adb.org/Documents/Reports/Samut_Prakarn/R151-05.pdf (last visited Aug. 5, 2005).

193. The CAO had an external review in 2003. *The External Review Team Report on the CAO office of IFC and MIGA*, (July 24, 2003), at <http://www.cao-ombudsman.org/pdfs/CAO%20Evaluation%20Report%207-26-03.pdf> (last visited Aug. 5, 2005). For analysis of the difficulty in including the compliance audit function within the CAO's other functions (advisory and ombudsman), see *id.* at 24–25.

Special Project Facilitator handles the consultation (problem-solving) phase and the Compliance Review Panel handles the compliance review phase. ADB uses “consultation” rather than “problem-solving” to avoid the impression that it can solve all problems, and the term conveys a more informal and multimethod approach. The consultation phase consists of the Special Project Facilitator (the SPF), who will respond to specific problems of locally affected people in ADB-assisted projects through a range of informal and flexible methods.¹⁹⁴

The question faced by ADB is how it can best facilitate the resolution of problems on the ground, recognizing that the complaints are primarily between the project owner, the DMC government, and the project beneficiaries, the local people affected by the project. It is also acknowledged that, as some issues are embedded in the political decision-making processes of the DMC government, the role of the SPF may be limited depending on the nature of the complaints.¹⁹⁵

Two principal issues relating to the SPF were its locus within the new ADB Accountability Mechanism and the scope of the subject matter of complaints that may be filed with it.¹⁹⁶ With respect to the former, ADB decided to place the consultation phase directly under Management by striking a balance between the need for an objective, detached perspective on a project and the need for sufficient knowledge of and experience with bank operations. The rationale was that any complaint of affected people will arise in the course of the formulation, processing, or implementation of a project, and it is Management that is responsible for all of these stages of the project cycle under the ADB Charter.¹⁹⁷ Regarding the second issue of the subject matter of complaints, the familiar question of “domestic jurisdiction” surfaced, challenging the scope of the SPF’s competence. Many DMCs did not want the SPF to probe into their areas of responsibility. Thus, the 2003 policy clearly provided that “[t]he SPF will not interfere in the internal matters of any DMC and will not mediate between the complainant and local authorities.”¹⁹⁸

The new ADB Accountability Mechanism places the consultation phase between the complainant and the compliance review phase. The

194. *New ADB Accountability Mechanism*, *supra* note 16, ¶ 29.

195. *Id.* ¶ 31.

196. *Id.* ¶¶ 29–36, 62–94.

197. ADB Charter, art. 34.5 (“The President shall be chief of the staff of the Bank and shall conduct, under the direction of the Board of Directors, the current business of the Bank.”). *Cf.* Fukuda, *supra* note 56, at 35–36. *See* The Bank Information Center (USA) et al., *Comments on the Working Paper of the ADB Inspection Function Review released February 21, 2003*, (Mar. 11, 2003), at http://www.bicusa.org/bicusa/issues/BIC_Comments_Inspection-3-11-03.pdf (last visited Aug. 5, 2005).

198. *New ADB Accountability Mechanism*, *supra* note 16, ¶ 60.

interests of economy and efficiency justify this structure, which addresses urgent claims of direct, material harm before the question of compliance, which will remain irrespective of the resolution of the problem.

EBRD's Independent Recourse Mechanism also provides for both problem-solving and compliance functions, though it houses them in one unit. EBRD will, through its Compliance Coordination Officer (CCO) as "co-ordinator,"¹⁹⁹ receive a complaint and determine if the complaint is eligible for "further processing."²⁰⁰ Further, when making the eligibility and compliance review assessment of the complaint, the CCO also considers whether problem-solving techniques might be usefully employed to resolve the issues underlying the complaint.²⁰¹ The EBRD President will decide whether any problem-solving initiative recommended by CCO should be undertaken.²⁰² No single person can simultaneously dispose of the question of eligibility for "further processing"²⁰³ of a complaint after it has been registered and the question of compliance review without being caught in a conflict of interest situation.

AfDB's Independent Review Mechanism is a combined compliance review and problem-solving mechanism, consisting of a Compliance Review and Mediation Unit (CRMU), headed by a Director, CRMU, and a roster of three experts. The Director, CRMU, and two experts to be identified by the Director constitute a compliance review panel.²⁰⁴ Upon receipt of the complaint, the Director will conduct a preliminary review to determine whether the request is "eligible for either a compliance review or a problem-solving exercise."²⁰⁵ AfDB's mechanism allows the compliance review to be conducted by the compliance review panel and the Director when the same Director has already determined whether the case is "more appropriate for problem-solving or compliance review."²⁰⁶

B. Oversight Functions in the Implementation of Decisions

The World Bank Inspection Panel, IDB's IIM, and ADB's 1995 Inspection Function are not tasked to monitor the progress of implementation of the recommendations adopted by the Board at the end

199. *EBRD Independent Recourse Mechanism*, *supra* note 54, ¶ 6 of annex 1.

200. *Id.* ¶ 12 of annex 1.

201. "Such techniques may include independent fact-finding, mediation, conciliation, dialogue facilitation, investigation and reporting." *Id.* ¶ 27 of annex 1.

202. *Id.* ¶ 27 of annex 1.

203. *Id.* ¶ 12 of annex 1.

204. AfDB IRM Resolution, *supra* note 55, ¶ 22; *AfDB IRM Operating Rules and Procedures*, *supra* note 55, ¶ 45.

205. AfDB IRM Resolution, *supra* note 55, ¶ 17; *AfDB IRM Operating Rules and Procedures*, *supra* note 55, ¶ 20.

206. *AfDB IRM Operating Rules and Procedures*, *supra* note 55, section I(b).

of the inspection process. In the World Bank's case, its argument is that since these recommendations are prepared and submitted by Management to the Board, the monitoring responsibility of implementation of the recommendations squarely belongs to Management itself. Actually, since these recommendations are made in response to the Inspection Panel's report and findings, the monitoring responsibility should belong to some other supervisory unit outside Management as per the *Chorzow* principle. The MDB's monitoring of how its decisions are implemented is part of the main task of international organizations "to supervise compliance with their rules."²⁰⁷ In the case of ADB, the monitoring vests in the Compliance Review Panel (for implementation of Board decisions following the outcome of a compliance review). In the case of EBRD, it is the CCO who will monitor the implementation, or possibly an expert whose recommendations have been approved by the President, the Board, or another expert from the roster.²⁰⁸ In the case of AfDB, it is the Director, CRMU, who monitors a problem-solving exercise and the Director, CRMU, and an expert who monitor a compliance review.²⁰⁹

MDBs²¹⁰ have shifted their focus to both problemsolving and compliance review from simply investigating the compliance or noncompliance of an MDB's operational activities. This move is in accord with the substantive principles behind empowering project-affected people to have effective access to the problem-solving institution. The consultation phase adds stability, power, and effectiveness to the mechanism designed to enhance the institution's accountability and development effectiveness on the ground.

C. The Need for Creativity in the Settlement of a Private Party's Claim

More than two decades ago, Dr. Mahnoush H. Arsanjani warned: "[T]he growth in the number of international claims has not been matched by a comparable development in theory or in the articulation of general policies to guide decision. The lag should be a cause of concern. Increases in IO activity can only lead to more claims-related problems."²¹¹ The progressive development taking place in the structure of accountability

207. SCHERMERS & BLOKKER, *supra* note 29, § 1390.

208. *EBRD Independent Recourse Mechanism*, *supra* note 54, ¶ 26 of annex 1.

209. *AfDB IRM Operating Rules and Procedures*, *supra* note 55, ¶¶ 40, 52(c)(iii).

210. In late 2003, IDB proposed a revision to its Independent Investigation Mechanism to include a problem-solving/consultation function for its internal consultation. The IDB website indicates in the third quarterly update of the 2005 Board work program that Board consideration of a "Proposal for enhancements to the Independent Investigation Mechanism" was scheduled for September 2005. See http://www.iadb.org/aboutus/iv/BOE_work.cfm?language=English (last visited Aug. 5, 2005).

211. Arsanjani, *supra* note 9, at 174.

mechanisms established in MDBs notwithstanding, the mechanism of inspection or compliance review remains mostly a tool for enhancing internal governance and accountability. A compliance review panel's substantive jurisdiction is limited to the review of compliance by an MDB. It may take remedial action, but its competence does not extend to the making of monetary indemnity or compensation for any material harm.

A corollary of the principle of responsibility is the principle of remedy, and the most appropriate mode of settlement for MDBs (for claims that cannot be settled by negotiation) is arbitration.²¹² There must be some creative alternative to allow private parties' claims to be settled through arbitration without jeopardizing the organizational effectiveness of MDBs. In the *Bares* case,²¹³ the ADB Administrative Tribunal alluded to a possibility of arbitration "to assess the international responsibility, tortious or otherwise, of an international organization on the plane of public international law"²¹⁴ as follows:

There was, of course, the theoretical possibility that the parties might have agreed to resort to this Tribunal not as the Administrative Tribunal of the Bank subject to its Statute but as a group of individuals who, though happening to be the Members of the Tribunal, have agreed, at the request and the consent of the parties and, for the purposes of the particular proceedings, to act as a special tribunal or arbitral body outside the scope of the Tribunal's Statute.²¹⁵

Each MDB has its administrative tribunal.²¹⁶ One possibility is to devise an appropriate passage for private parties' claims from an MDB's compliance review phase to its administrative tribunal, which could be metamorphosed as a special tribunal established at the request and consent of the parties. An important consideration is that an MDB's functions and purposes are delineated by the principle of specialty; member states invest international organizations with certain powers, the limits of which are a

212. A proper forum for the settlement of any disputes between an MDB and its borrowers, not resolved by negotiation, is arbitration as provided for in the applicable loan regulations, so long as such disputes arise in connection with the performance of the loan or guarantee agreement. In the case of member states, an MDB's charter provides, "Members shall have recourse to such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulation of the Bank, or in contracts entered into with the Bank." ADB Charter, art. 50.2.

213. *Bares*, *supra* note 116.

214. *Id.* at 57, ¶ 17.

215. *Id.* at 56, ¶ 14.

216. For a discussion on different groups of international administrative tribunals and recommendations, see Suzuki, *supra* note 29, at 205-07.

function of their common interests.²¹⁷ The principle of speciality supports organizational effectiveness, and the need for organizational effectiveness should determine the scope of how an MDB discharges its responsibility and provides remedies in the settlement of private claims.²¹⁸

When the rights and interests of private individuals and groups conflict with those of international organizations through claims lodged within an internal accountability mechanism or special tribunal, a reconfiguration of authority and control over decisions of international organizations inevitably occurs.²¹⁹ One guide for this reconfiguration is the Universal Declaration of Human Rights of 1948, which is customary international law and has the attributes of *jus cogens*.²²⁰ As such, the human rights provisions in the Universal Declaration are binding not only on states but also on international organizations and "anyone whose choice about an event can have some international significance."²²¹ Any one of these international actors might be held affirmatively responsible for a particular violation of human rights. Viewed in this light, the accountability mechanisms of MDBs are at the forefront of the development of the international law of human rights, which "depend[s] in no small measure upon the ability of individuals and private groups to challenge unlawful deprivations."²²²

217. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, *supra* note 59, at 78, ¶ 25.

218. Arsanjani, *supra* note 9, at 174.

219. REISMAN, *supra* note 19, at 13.

220. On *jus cogens*, see BROWNLIE, *supra* note 80, at 488–90. See also McDUGAL, LASSWELL & CHEN, *supra* note 18, at 339–50.

221. McDUGAL & REISMAN, *supra* note 21, at 2. *Final Report*, *supra* note 4, at 22–23 suggests that human rights obligations, apart from those that have attained the status of peremptory norms, can become binding upon international organizations in different ways, such as the terms of their charters, as general principles of international law, or if the organization is authorized to become a party to a human rights treaty.

222. McDUGAL, LASSWELL & CHEN, *supra* note 18, at 279.